152 US 346

RECORD, CASE No. 14,266.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 251.

THE WESTERN NATIONAL BANK OF NEW YORK, APPELLANT,

vs.

DAVID ARMSTRONG, RECEIVER OF THE FIDELITY NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 13, 1890.

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1 UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } ss:

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, O., in said district, on the first Tuesday of April, being also the first day of that month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth—present, the Honorable Howell E. Jackson, circuit judge, and the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

WESTERN NATIONAL BANK OF NEW YORK, Complainant,
vs.
DAVID ARMSTRONG, as Receiver of Fidelity National Bank of Cincinnati, Defendant. } In Equity.

Be it remembered that heretofore, to wit, on the eighth day of December, in the year of our Lord one thousand eight hundred and eighty-eight, came the complainant, The Western National Bank of New York, by its solicitors, and filed in the clerk's office of said court its certain bill of complaint herein against the defend-
2 ant, David Armstrong, receiver of the Fidelity National Bank of Cincinnati; said bill of complaint is clothed in the words and figures following, to wit:

Bill of Complaint.

Circuit Court of the United States, Southern District of Ohio, Western Division.

WESTERN NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver of Fidelity National Bank of Cincinnati. } In Equity.

To the judges of the circuit court of United States for the southern district of Ohio:

The Western National Bank of New York brings this its bill against Davis Armstrong, as receiver of the Fidelity National — of Cincinnati, and thereupon your orator complains and says:

That it is a corporation duly organized and existing under and by virtue of the laws of the United States of America, and that it has its place of business in the city of New York and in the State of New York, and as such is a citizen and resident of said State, and that David Armstrong is the receiver of the Fidelity National bank and as such is a resident of the southern district of Ohio and of the

western division thereof, and that said David Armstrong is a citizen of the State of Ohio.

That on the 20th day of June, 1887, the Fidelity National bank became insolvent, and said David Armstrong was, on or about the same day, by the duly authorized officers of the United States, duly appointed receiver of all and singular the property and assets
3 thereof, and accepted said trust, duly qualified, and is still acting as such, and has in his hands a large sum of money which he has realized from the collection and reduction into money of said assets, which he holds for distribution among the creditors of said Fidelity National bank.

Your orator says that said Fidelity National bank was when defendant was so appointed receiver thereof and still is indebted to your orator on an account, a copy of which is hereto attached and made part hereof, marked "A," in the sum of $195,415.37.

The credit of $200,000 to said Fidelity National bank therein is on account of a loan of said sum made to said bank by your orator on May 28, 1888, at the special instance and request of E. L. Harper, who was then the vice-president and general manager of the said Fidelity National bank, with full authority to make said loan on its behalf.

Collateral notes signed by one A. P. Gahr and endorsed by said E. L. Harper were given therefor, secured by the endorsement and delivery to your orator by said Harper of four certificates of stock in said Fidelity National bank, numbered respectively 713, 714, 715, and 716, each certifying that said Harper was the owner of four hundred shares of the capital stock of said Fidelity National bank of the par value of $100 each. Said certificates were signed by Briggs Swift, the president, and Ammi Baldwin, the cashier, of said Fidelity National bank, the officers by said bank duly authorized to issue certificates of stock therein, and said certificates bore the true imprint of the corporate seal of said Fidelity National bank and were delivered and issued by said officers to said Harper on May 26, 1888. Said notes were when they fell due and still are entirely worthless by reason of the insolvency of said Gahr and Harper, and your orator is ready and offers to surrender the same to defendant.

4 Your orator says that said certificates did not and do not represent stock of said Fidelity National bank, but were wholly invalid and void for the following reasons, to wit: The authorized capital of said Fidelity National bank was only $1,000,000, being 10,000 shares of $100 each, certificates for which had all been issued long prior to said May 26, 1887, none of which certificates were surrendered for the four certificates aforesaid.

But the directors of said Fidelity National bank, in March, 1887, voted to increase its capital to $2,000,000, each holder of its original stock to have the privilege of taking an equal amount of such increase of stock by paying therefor at the rate of $135 per share.

And thereupon certain holders of such original stock paid to said bank, long prior to May 26, 1887, on account of such increased stock, when the same should be duly authorized, large sums of money, to

be held by said bank until the steps required by law to authorize such increase should be duly taken, to wit:

S. A. Baker, on 10 shares	$1,350
Sol. P. Kineon, on 10 shares	1,350
The Citizens' Ins. Co., on 25 shares	3,375
Jos. Joseph & Bros., on 10 shares	1,350
Mary P. Buchanan, on 40 shares	5,400
Oscar I. Frank, on 12 shares	1,620
H. Eastman, on 15 shares	2,025
Anna S. Hall, on 25 shares	3,375
C. W. Willis, on 13 shares	1,755

being $21,600 in all on 160 shares; and each and all of said
5 persons, prior to said May 26, 1887, for value received, sold and transferred to said Harper all their right and title to said sums so paid by them respectively and to the increased stock to be issued therefor when the steps should have been duly taken to authorize such increase according to law.

And said Harper, on April 5th, 1887, paid to said Fidelity National bank, on account of such increased stock, when authorized as aforesaid, $130,072.50 for such increased stock to which he would be entitled on account of 1,927 shares of original stock owned by him and standing in his name on the books of said bank, and on April 7, 1887, the further sum of $55,417.50 on account of such increased stock to which he would be entitled when the same should be so authorized by reason of his ownership of 821 shares of said original stock standing in the name of other persons from whom he had theretofore bought the same; all of which sums said Fidelity National bank agreed to and did hold on special deposit and in trust for the payers thereof respectively until such increase of stock should be duly authorized.

But your orator says that the stockholders of said bank never voted for such increase of said capital; that notice of said intended increase of said capital, with a certificate that the full amount of the same had been fully paid in, was never sent to the Comptroller of the Currency of the United States, and said Comptroller never assented to or approved such increase of capital, as required by law, and that the full amount of such increase of capital never was paid in,
6 but, nevertheless, said Harper procured from said president and cashier of said bank the certificates of stock so pledged with your orator, as aforesaid, and the same were wrongfully issued by them to him.

When said certificates numbered 713, 714, 715, and 716 were so issued to said Harper, the stock of said Fidelity National bank had an established market value of $153 per share, which was well known to your orator, and your orator relied on said certificates as one of the securities for said loan when it so made the same as aforesaid.

But your orator says that by reason of the issuing and transfer to it of the certificates aforesaid it has been subrogated to the right of said stockholders to recover from said Fidelity National bank the

sums so paid in by them, respectively, on account of such proposed increase of capital stock, and now holds such rights as security for said loan.

Your orator further says that on the — day of October, A. D. 1887, it duly presented to said David Armstrong, receiver as aforesaid, its claims aforesaid, and requested that the same be allowed by him as valid claims to be paid out of the assets of said Fidelity National bank, so in his hands as aforesaid, but said receiver refused and still refuses to allow the same, and will, unless otherwise ordered by your honors, pay out said assets to the other creditors of said Fidelity National bank to the entire exclusion of your orators.

Wherefore your orator prays that said David Armstrong, receiver as aforesaid, be required to allow the claim of your orator for said sum of $195,415.37, so due to it from said Fidelity National
7 bank on said account, and to pay to it dividends thereon from funds received and to be received by him the same as to other *ex*creditors of said Fidelity National bank; that it may further be adjudged and decreed to be subrogated to all and singular the rights of said persons who so paid money to said bank in anticipation of such increase of stock, to recover the said sums from said bank, and that said receiver be required to allow the same as valid claims to the amount of $207,290, and to pay the same to your orator as preferred claims, or, if they shall be adjudged not to be such, then to pay to your orator the dividends thereon from funds received or to be received by him unto the amount which may be necessary to pay the balance remaining due on said first-named claim on said account in full after payment of all dividends thereon, and for all other and such further relief as may be just and proper.

Wherefore and considering the premises and to the end that the said David Armstrong may full, true, and perfect answer make unto this bill and every part thereof, may it please your honors to award unto your orator the writ of subpœna to be directed to the said David Armstrong, as receiver as aforesaid, and commanding him, upon a certain day therein to be named and under a certain penalty therein to be fixed, to appear in this court and therein to abide the order, judgment, and decree of this honorable court; and your orator will ever pray.

HARMON, COLSTON, GOLDSMITH & HOADLEY,
Solicitors for Complainant.

JUDSON HARMON,
GEO. HOADLEY, JR., *Of Counsel.*

8 *Fidelity National Bank of Cincinnati, Ohio, in ℅ with Western National Bank of New York.*

Dr.			Cr.		
1887.					
June 3.	To draft No. 3100	75,000	May 28.	Discount	200,000
" 4.	" 3101	100,000	" 31.	Interest on acc. May	33 33
" 13.	On loan (collection	77 19	Sept. 3.	Int. on acc.	8 49
" "	" " "	375		Balance	195,415 37
" 17.	" 3102	20,000			
Sept. 29.	Note, A. P. Gahr, due to-day	*50,000			
"	"	50,000			
"	"	50,000			
"	"	50,000			
30.	Protest fees on above, $200,000	5			
		395,457 19			395,457 19
Sept. 30.	To balance	195,415 37			

* Interest on these amounts paid, June 2d, 1887, $1,133.33.

E. & O. E.

9 And afterwards, to wit, on the 8th day of Decem'r, A. D. 1889, there was issued out of the clerk's office of said court our certain subpœna, directed to the marshal of the southern district of Ohio; said subpœna is clothed in the words and figures following, to wit:

Subpœna to Marshal of Southern District of Ohio.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon David Armstrong, as receiver of Fidelity National Bank of Cincinnati, citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in October next, to answer a certain bill in chancery filed and exhibited in said court against it by Western National Bank of New York, a corporation created and existing under the laws of the State of New York, citizen of and resident in the State of New York.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

10 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of Dec., A. D. 1888, [SEAL.] and in the *114th* (113th) year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.*

Memorandum.

The said defendant is required to enter its appearance in this suit in the clerk's office of said court on or before the first Monday of January, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

And afterwards, to wit, on the 13th day of December, A. D. 1888, the following cost bond was filed in the clerk's of said court, clothed in the words and figures following, to wit:

Cost Bond.

11 Circuit Court of the United States for the Southern District of Ohio, Western Division, *ss:*

WESTERN NAT'L B'K OF NEW YORK
vs.
DAVID ARMSTRONG, Rec'r of Fidelity Nat'l Bank. } No. 4204. Cost Bond.

I hereby acknowledge myself security for costs in this case.
JACOB STOEHR, [SEAL.]

Taken and acknowledged before me this — day of ——, 18—.
——— ———,
Clerk U. S. — Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, —— ——, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth — dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

——— ———.

Sworn to and subscribed before me this — day of ——, A. D. 188—.
——— ———,
Clerk U. S. — Court, S. D. O.

12 And afterwards, to wit, on the 14th day of Dec., A. D. 1888, came the marshal to whom the above subpœna was in form directed and filed the same in the clerk's office of said court, with his proceedings had endorsed thereon, in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, Ohio, on the 8th day of December, 1888, and at said Cincinnati, Ohio, on the 10th day of December, 1888, I served the within-named David Armstrong, as receiver of Fidelity National Bank of Cincinnati, with a true copy of this writ, having all the endorsement thereon, handed to him personally.
Fees: Total, $2.56.

H. C. URNER, *U. S. Marshal,*
By RICHARD C. ROHNER, *Deputy.*

And afterwards, to wit, on the 25th day of January, A. D. 1889, the following appearance was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appearance of Kittredge & Wilby.

To the clerk:

Please enter our appearance in above-entitled cause as counsel for defendant.

KITTREDGE & WILBY,
Sol'rs for David Armstrong, Receiver, Def't

Cin'ti, Jan'y 24, '89.

13 And afterwards, to wit, on the 12th day of March, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, 247.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE WESTERN NATIONAL BANK OF NEW YORK, Complainant,
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Defendant.

This day came the defendant above named and presented to the court his exceptions to the bill of complaint herein and prayed for leave to file the same, which, for good cause shown, is granted, and the said exceptions of the defendant are hereby ordered and allowed to be filed, which is accordingly done.

And afterwards, to wit, on the 12th day of March, A. D. 1889, the following exceptions were filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Exceptions.

14 Circuit Court of the United States, Southern District of Ohio, Western Division.

WESTERN NATIONAL BANK OF NEW YORK, Complainant,
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank of Cincinnati, Ohio, Defendant.
In Equity. = 4204.

Exceptions of David Armstrong, receiver, to the bill of complaint of the Western National Bank of New York.

First exception. Now comes David Armstrong, receiver of the Fidelity National bank, defendant above named, and excepts to the following part of said bill of complaint, beginning on the fourth page thereof, with the words "And thereupon certain holders of such original stock paid to said bank long prior to May 26th, 1887,"

and ending with the words "all of which sum said Fidelity National bank agreed to and did hold on special deposit
15 and in trust for the payers thereof, respectively, until such increase of stock should be duly authorized," on the fifth page thereof, on the ground that all of said language is impertinent, irrelevant, and immaterial to the case sought to be made and charged in the said bill against the said defendant, and relate to matters which are improper to be joined with the case sought to be made by the complainant in its bill, and defendant prays that said matter be expunged and stricken from said bill.

Second exception. Said David Armstrong, receiver, further excepts to so much of said bill of complaint as avers as follows: "But your orator says that by reason of the issuing and transfer to it of the certificates aforesaid it has been subrogated to the right of said stockholders to recover from said Fidelity National bank the sums so paid in by them respectively on account of said proposed increase of capital stock, and now holds said right as security for said loan," on the ground that all of said language is impertinant, irrelevant, and immaterial to the case sought to be made and charged in the said bill against the said defendant and relate to matters which are improper to be joined with the case sought to be made by the complainant in its bill, and defendant therefore prays that said matter be expunged and stricken from said bill.

16 Third exception. Said David Armstrong, receiver, further excepts to so much of the prayer of said bill of complaint as avers as follows: "That it may further be adjudged and decreed to be subrigated to all and singular the rights of said persons who so paid money to said bank in anticipation of said increase of stock to recover said sums from said bank, and that said receiver be required to allow the same as valid claims to the amount of $207,290.00 and to pay the same to your orator as preferred claims, or, if they shall be adjudged not to be such, then to pay to your orator the dividends thereon from funds received or to be received by him up to the amount which may be necessary to pay the balance remaining due on said first-named claim on said account in full after payment of all dividends thereon," on the ground that said language is impertinent, irrelevant, and immaterial to this cause and forms no part of any relief proper to be had or prayed for by the complainant in and of the case sought to be charged and made in the bill of complaint herein and relates to matters and things not proper to be joined with the case sought to be made by the complainant in its bill, and defendant therefore prays that said matter be expunged and stricken from said bill.

W. B. BURNET,
KITTREDGE AND WILBY,
For D. Armstrong, Receiver.

17 And afterwards, to wit, on the 8th day of May, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 313.

This cause coming on to be heard upon the exceptions to the complainant's bill and being argued by counsel and submitted to the court, the court, upon consideration thereof, doth overrule said exceptions and doth grant leave to the defendant to file his demurrer to said bill either generally or setting out his special grounds of demurrer, as he may be advised, within ten days.

And afterwards, to wit, on the 9th day of May, A. D. 1889, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

18 Circuit Court of the United States, Southern District of Ohio, Western Division.

THE WESTERN NATIONAL BANK OF NEW YORK, Complainant,
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank of Cincinnati, Ohio, Defendant. } No. 4204. In Equity.

Demurrer of David Armstrong, receiver, to bill of complaint of the Western National Bank of New York.

Now comes this defendant, by leave of court duly had, and by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demurs to so much and such parts of said bill as are set forth as follows, to wit:

Beginning on the fourth page thereof with the words:

"And thereupon certain holders of such original stock paid to said bank long prior to May 26th, 1887," and ending with the words:

"All of which sum said Fidelity National bank agreed to and did hold on special deposit, in trust for the payers thereof respectively, until such increase of stock should be duly author-
19 ized," on the fifth page thereof.

And the further language in said bill as follows:

"But your orators say that by the issue and transfer to it of the certificates aforesaid it has been subrogated to the rights of said stockholders to recover from said Fidelity National bank the sum so paid in by them respectively on account of said proposed increase of capital stock and now hold said right as security for said loan."

And the following language of the prayer of said bill:

"That it may further be adjudged and decreed to be subrogated to all and singular the rights of such persons who so paid money to said bank in anticipation of said increase of stock to recover said

sums from said bank, and that said receiver be required to allow the same as valid claims of the amount of two hundred and seven thousand two hundred and ninety dollars ($207,290.00), and to pay the same to your orator as preferred claims; or, if they shall be adjudged not to be such, then to pay to your orator the dividends thereon from funds received or to be received by him up to the amount which may be necessary to pay the balance remaining due on said first-named claim on said account in full after payment of all dividends thereon."

And for causes of demurrer to the above-recited parts of said bill defendant showeth that the complainant hath not in and by the said language above set forth, being part of said bill, made or stated such a case as entitles it in a court of equity to any discovery from this defendant or to any relief against him as to the matters contained in said portions of said bill or any of such matters.

19½ And further, and for a second ground or cause of demurrer, the defendant showeth that there is shown by the bill and by the said portion thereof above set forth to be a defect of parties defendant necessary to the determination of the matters and things sought to be charged in that portion of the bill as is above set forth; that the said Fidelity National bank and E. L. Harper or his assignee, and the other persons named in the portion of the bill above set forth are some or all of them necessary parties to the granting of the relief prayed for in said portion of said bill.

And this defendant doth further demur to the whole of said bill, and for third ground or cause of demurrer showeth that it appears by the said bill that the same is exhibited against this defendant for distinct and independent matters and causes, for that the matters and things set forth and the relief prayed for in that part or so much of said bill as is set forth in the first ground of this demurrer is distinct, unconnected with, immaterial to, and forms no part of the relief prayed for, and the matters and things alleged in the rest or residue of said bill other than the part or portion thereof specifically above set forth and described in the first ground or cause of this demurrer and the said distinct and unconnected matters and prayers aforesaid are improperly joined in one bill, and that therefore and thereby the said bill is altogether multifarious.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto and to certain portions thereof as hereinabove stated, and humbly demands the judgment of this court whether he shall be compelled to
20 make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

KITTREDGE & WILBY,
W. B. BURNET,
Solicitors for Defendant.

I hereby certify that I am solicitor and of counsel for the defendant in the above-entitled cause, and that in my opinion the foregoing demurrer of David Armstrong, receiver of the Fidelity National

bank, defendant, to the bill of complaint of The Western National bank of New York, complainant, is well founded in point of law and proper to be filed in the above-entitled cause.

JOSEPH WILBY.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division.

STATE OF OHIO,
Hamilton County, } *ss:*

David Armstrong, being first duly sworn, deposes and says that the foregoing is not interposed to delay this cause or any proceedings therein.

DAVID ARMSTRONG.

Sworn to before me and subscribed in my presence this 9th day of May, A. D. 1889.

RUFUS S. SIMMONS,
Notary Pub., Hamilton County Ohio. [SEAL.]

And afterwards, to wit, on the 13th day of November, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 476.

21 Circuit Court of the United States, Southern District of Ohio, Western Division.

THE WESTERN NATIONAL BANK OF NEW YORK, Complainant,
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Defendant.

This cause came on to be heard on the demurrer of the defendant to portions of complainant's bill, and was argued by counsel, and on consideration thereof the court sustains said demurrer to so much of said bill as is recited therein.

And leave is given to the defendant to answer the remainder of said bill in ten days.

And afterwards, to wit, on the 17th day of January, A. D. 1889, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

22 Circuit Court of the United States, Southern District of Ohio, Western Division.

THE WESTERN NATIONAL BANK OF NEW YORK, Complainant,
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Defendant.

Answer.

To the judges of the circuit court of the United States for the southern district of Ohio:

And now comes the said David Armstrong, receiver of the Fidelity National bank, defendant in the above cause, and, for his answer to the bill of complaint filed herein, or to so much thereof as has not been adjudged insufficient in law by the order of this court, answering, says:

He admits that the complainant is a corporation organized under the laws of the United States, doing business in the State of New York, and a citizen and resident of said State, and that the defendant is the receiver of the Fidelity National bank and a citizen of and resident of the State of Ohio; that on the 20th day of June, 1887, the said Fidelity National bank became insolvent, and that this defendant was thereupon, by the duly author-
23 ized officers of the United States, appointed receiver of its assets and that he accepted such trust and is still acting as receiver, and that he has collected a large sum of money which the Comptroller of the Currency, but not this defendant, holds for distribution among the creditors of said Fidelity National bank.

But this defendant denies that the said Fidelity National bank was, at the time defendant was appointed receiver of said bank or is now, indebted to the complainant in the sum of $195,415.37 or in any sum whatever, except in the sum of $452.19 on open account, in no way connected with the claim set forth in petition.

Defendant denies that the complainant loaned to the said Fidelity National bank, on the 28th day of May, 1887, the sum of two hundred thousand dollars or any other sum.

Defendant admits that E. L. Harper, who was the vice-president and a director of the Fidelity National bank, but only such, sent to the complainant four notes of A. P. Gahr, endorsed by said Harper; said notes were discounted by said complainant for said Harper and the proceeds of said discount were received by said Harper. The said notes were at no time the property of said Fidelity National bank, nor were they indorsed by it, but were discounted by complainant in the regular course of business, without the indorsement of the said Fidelity National bank and solely on the security of said paper as endorsed by said Harper and of the collaterals remitted therewith in the sixteen hundred shares of

stock of the said Fidelity National bank, which was the property of said Harper.

Defendant denies that the Fidelity National bank had any interest in said transaction, nor was it in any way responsible therefor.

And for a further answer this defendant says that the
24 said complainant has been paid a large sum on said pretended claim which should be credited thereon. This defendant is unable at this time to state the exact amount so paid, but will at the trial of this cause show the same to this court.

And defendant, having fully answered, asks to be dismissed hence with his costs.

JOHN W. HERRON,
Counsel for Def't.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

David Armstrong, the defendant herein, makes oath that the facts stated herein as of his own knowledge are true and those stated on information of others he believes to be true.

DAVID ARMSTRONG.

Sworn to before me and subscribed in my presence this 17th day of January, A. D. 1890.

W. C. HERRON,
Notary Public in and for Ham. County, Ohio. [SEAL.]

And afterwards, to wit, on the 4th day of March, A. D. 1889, the following replication was filed in the clerk's office of said court, clothed in the words and figures foloowing, to wit:

Replication.

25 & 26 Circuit Court of the United States, Southern District of Ohio, West. Div.

THE WESTERN NATIONAL BANK OF NEW YORK, Complainant, }
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank, Defendant. }

Replication of The Western National Banl of New York, complainant, to the answer of David Armstrong, receiver of the Fidelity National bank, defendant.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto saith that it will aver and prove its said bill to be true, certain, and sufficient in the laws to be replied unto by this repliant; without this, that no other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is

true; all of which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in its said bill it hath already prayed.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Solicitors for Complainant.

JUDSON HARMON, *Of Counsel.*

27 And afterwards, to wit, on the 5th day of April, A. D. 1890, the following deposition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

28 *Notice.*

STATE OF OHIO, *Hamilton County,* } ss:

WESTERN NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank, Defendant. } Case No. 4204.

Pending in United States circuit court, southern district of Ohio, western division, in equity.

The above-named defendant will take notice that on Friday, the 28th day of March, A. D. 1890, the complainant above named will take the depositions of Conrad N. Jordan, C. J. Canda, F. Blankinhorn, Edward Gogorza, & Henry A. Smith, and sundry witnesses, to be used as evidence in the trial of the above cause, at the office of Chas. F. MacLean, att'y-at-law, No. 20 Nassau St., New York city, in the county of New York, in the State of New York, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Attorneys for Complainant.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this 21st day of March, A. D. 1890.

JOHN W. HERRON,
Attorney for Respondent.

Instructions for Taking Depositions.

1. In cases in any United States court the above notice must name each witness; in any Ohio court, if his deposition is to be used in his own behalf, the notice must specify that the witness is a party to the suit; otherwise no witness need be named.

2. Depositions to be used in any Ohio court may be taken in Ohio before a judge or clerk of the supreme or common pleas court

or probate judge; before a notary public, justice of the peace, police judge, mayor or chief magistrate of any city or town corporate, master commissioner, or person empowered by a special commission; out of Ohio, before a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, commissioner appointed by the governor of Ohio to take depositions, or any person authorized by a special commission. Depositions, to be used in any district or circuit court of the United States, may be taken before any judge of any United States court; any commissioner of any United States circuit court; any clerk of any United States district or circuit court; any chancellor, justice, or judge of a supreme or superior court; any mayor or chief magistrate of a city; any judge of a county court or court of common pleas of any of the United States, or any notary public, such officer not to be a relative nor of counsel or attorney to either party nor otherwise interested in the event of the cause.

3. The depositions must be commenced on the day named, and some portion of a deposition taken on each successive day, Sundays and legal holidays excepted; adjournments being to the day next after the Sunday or holiday, unless otherwise agreed upon.

4. When depositions are taken under an agreement, follow these instructions, except only where they are modified by the agreement.

5. State, at the beginning of the deposition of each witness, that "(name the witness), of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:" Here write his deposition, which may be taken by stating the facts in narrative form or in reply to questions first written down. Each witness must sign and may write his own deposition.

6. Objections to any question or answer or to any part of either, or to any witness, should be entered by the officer taking the depositions, if either party demands it. This entry briefly states the objection and by whom it is made.

7. Letters, telegrams, etc., made part of the evidence, must be lettered or numbered consecutively, attached to the deposition, and referred to therein by the witness as "Exhibit A" or "Exhibit No. 1" (or 2, 3, etc.), or otherwise, according to the fact.

8. Adjournments, if there are any, and the beginning of the cross-examination and redirect examination should be noted by the officer at the time they occur; also any agreements concerning the depositions, entered into by the parties to the suit or by their attorneys.

9. If taken by interrogatories and cross-interrogatories, under agreement or otherwise, these must each be put to the witness, and answered so far as he can answer it, and the answer be written down. The deposition must show that each interrogatory and cross-interrogatory was thus put and answered. Attach the interrogatories and cross-interrogatories, as received, to the depositions.

10. If the depositions are to be read in an Ohio court, and are taken before a mayor, notary public, or commissioner appointed as

aforesaid, they must be certified under his official seal; if before any of the other officers above named (a special commission excepted), and out of Ohio, a certificate, under the seal of the court of the county or the great seal of the State in which the depositions are taken, must be annexed to the certificate of the officer taking the deposition, that he was, at the time of taking the same, such officer as he represents himself to be in his certificate. This proof of official character is omitted when waived by agreement of the parties at the foot of the notice. This agreement does not waive the taking them at the time and place named in the notice.

11. The notice or agreement under which the depositions are taken must be attached to the depositions.

12. The whole should be sealed up and indorsed with the title (and number, if known,) of the suit and name of officer taking the depositions and in whose behalf taken, and addressed and transmitted by said officer to the clerk of the court where the suit is pending; also indorse on the sealed side, "Sealed up, addressed, and transmitted by me," and sign this across the place sealed.

13. ☞See, also, the instructions below the certificate, on third page of this sheet.

Depositions of sundry witness-, taken before me, —— ——, a — within and for the county of —, in the State of —, pursuant to the annexed notice — and at the time and place therein specified, to be read in evidence on behalf of the — in an action pending in —, in which —— —— — plaintiff and —— —— — defendant; —— —— being present on behalf of plaintiff and —— —— on behalf of defendant.

—— ——, of lawful age, being by me first duly cautioned and sworn, — deposes and says as follows:

1st question. —.

29 THE STATE OF —, } ss:
— *County*, }

I, —— ——, a — in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named[1] —— —— w- by me first severally sworn — to testify the truth, the whole truth, and nothing but the truth, and that the deposition- by — subscribed as above set forth w- reduced to writing by[2] —— —— and w- subscribed by the said witness- respectively in my presence and w- continued from day to day, as above set forth; that said deposition- w- taken at the time and place specified in the notice hereto attached and that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.[3]

In testimony whereof I have hereunto set my hand and official seal this — day of —, A. D. 18—.

[SEAL.] —— ——.

1. Here name all the witnesses whose depositions have been taken.

2. The attorney or others may write the questions. The answers, in Ohio cases, must be written either by the officer taking the depositions, in the presence of the witness, by the witness in presence of the officer, or by some disinterested person in presence of said officer and of the witness. In United States cases, by said officer or by the witness in the officer's presence, and by no other person; and the officer must certify accordingly; therefore write here, "myself, in the presence of the witness," or "myself, in presence of the witnesses respectively," or "said witness in my presence," or "said witnesses respectively in my presence," or "C. D., who is not interested in the suit, in my presence and in presence of the witness" (or "witnesses respectively"), or otherwise, according to the facts, if a part were written by the officer and a part by other authorized persons.

3. If the deposition is to be used in any United States, district, or circuit court, the certificate must also state the reasons for taking the depositions, as: that the witness lives more than a hundred miles from the place of trial; that he is bound on a voyage to sea; that he is ancient and infirm, etc.; in such case add here, "I further certify that," etc., as required.

Costs.

In Ohio cases: The officer taking the depositions is entitled to the fees set forth in the cost bill below.

In United States cases: United States commissioners are entitled to 10 cents for each oath administered; 20 cents for each one hundred words (each figure being counted one word) in depositions and certificate, and 25 cents for each subpena. U. S. Rev. Stat. §§ 847, 854. As notaries public may take such depositions, they are presumably entitled to same fees as such commissioners. See § 863. In contested election cases, same fees as allowed by State in which deposition is taken. § 129. Witnesses are entitled to $1.50 a day and five cents per mile each way. § 848. The depositions may be retained by the officer taking them till these costs are paid.

Cost Bill.

Writing and certifying depositions at 70 cents per 100 words	$24 00
Subpena of witnesses, 50 cents	
Swearing witnesses, 10 cents each (4)	40
Clerk's certificate and stamp	25
Postage and other necessary expenses (act'l cost)	
Attachment of — witness, 50 cents each	
Commitment of — witness, 50 cents each	
Constable's fees:	
Service of — subpena	
Mileage on — subpena	
	$24 65

Witness fees:

(At 75 cents per day and 5 cents traveling fees, each way, if not less than one mile.)		
C. N. Jordan	$3 00	
C. J. Canda	1 50	
E. Gogorza	1 50	
Henry A. Smith	1 50	
		$7 50
Total costs of taking depositions		$32 15

Received of — the sum of $— in full of my fees, as above specified, and also $— in full of constable's fees. The witnesses were paid their fees by —— ——.

—— ——.

[Endorsed:] Depositions taken on behalf of the complainant in the case of Western National Bank of New York, plaintiff, against David Armstrong, rec'r of Fidelity Nat'l bank, defendant. Pending in the U. S. circuit court of S. D. of Ohio, *county*, western division.

30 STATE OF OHIO, *Hamilton County*, } ss:

WESTERN NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff,
versus
DAVID ARMSTRONG, Receiver of the Fidelity National Bank, Cincinnati, Defendant.

Cause pending in the United States circuit court, southern district of Ohio.

It is hereby stipulated that the depositions of witnesses pursuant to the annexed notice be taken at the office of the Western National bank, in the city of New York, 120 Broadway, New York, instead of at the place stated in the notice dated March 20, 1890.

Depositions of sundry witnesses taken before me, William S. Mathews, a notary public within and for the county of New York, in the State of New York, pursuant to the annexed notice and the agreement of counsel, and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States for the southern district of Ohio, in which The Western National Bank of the City of New York is plaintiff and David Armstrong, receiver of the Fidelity National bank, Cincinnati, is defendant.

31 CONRAD N. JORDAN, of legal age, being by me first duly sworn, deposes and says:

Q. 1. What is your residence, age, and occupation?

A. I reside in Englewood, N. J.; am 60 years old; I am president of the Western National bank.

Q. 2. How long have you been such?

A. Since April, 1887—I think it was—until death of Mr. Manning—was vice-president, and since then president.

Q. 3. Had you any business relations in April and May, 1887, between the Western National bank and the Fidelity bank?

A. Yes, sir.

Q. 4. What were they?

A. They opened an account with us.

Q. 5. You were actually in the superintendency of the business of the bank at that time?

A. Yes; I was actually in the superintendency of the bank at that time—on May 24th.

Q. 6. When was that account opened with you?

A. I would like to get the exact date.

Q. 7. Upon what application or negotiation was that account opened?

A. Upon negotiation made with Mr. Harper.

Q. 8. By letter?

A. By letter—yes, sir; May 16, 1887. There were previous negotiations with reference to collections.

Q. 9. Was the collection account opened by letter?

A. By letters dated April 28 and 30, signed E. L. Harper, vice-president, a copy of which is hereto annexed and made part of my deposition, marked Nos. 1 and 2.

Q. 10. And signed?

32 A. And signed E. L. Harper, vice-president.

(It is consented in all cases that copies be attached, originals to be produced on trial if required.)

Q. 11. What answer was made to this letter of April 28 and 30, answered under date of May 16th? It is marked here.

A. Our letters of May 6th and 13th? May 6th was the first one; that is with reference to the certificates.

Q. 12. What was the next correspondence you had with them?

A. May 10th.

By Mr. GRAHAM:

Q. 13. Then you received a letter from them of May 10?

A. Yes, sir; it was answered on May 13th. A copy of the letter of May 10 is hereto annexed, marked Exhibit 5.

By Mr. HERRON:

Q. 14. May 10 is #5. Now, then, you answered that?

A. I answered that by letter of May 13; that is with reference to doing their business here.

By Mr. GRAHAM:

Q. 15. What was the next letter you received from them?

A. The letter of May 16, a copy of which is hereto annexed, marked Exhibit 6.

Q. 16. Answered when?

33 A. The 18 and 20th. Here are our letters, copies — which are hereto attached, marked Exhibits 7 and 8.

Q. 17. That letter of May 16 was the first letter that you had applying for a loan?

A. Yes, sir. (Reads letter.)

Q. 18. You further answered that under date of May 24?

A. Yes; a copy of which letter is hereto attached, marked Exhibit 9.

Q. 19. What was the substance of that letter? (Reads.) Who is Mr. Brennan?

A. Mr. Brennan is our correspondence clerk.

Q. 20. And writes letters under your dictation?

A. Yes; I dictate them.

Q. 21. I next produce the letter of May 26th, 1887, a copy of which is hereto annexed, marked Exhibit No. 10.

A. May 26 or 27.

Q. 22. May 26th; that was answered on May 28.

A. Yes, sir. (Reads.) A copy is hereto attached, marked Exhibit No. 11.

Q. 23. Mr. Jordan, what did you do after this letter of May 20; did you submit it to the board?

A. Yes, sir.

Q. 24. State what occurred at that meeting of the board. What was the date of that meeting—it was on Tuesday?

A. The account was opened on May 28th by a discount of $200,000, in the name of the Fidelity National bank, Cincinnati.

Q. 25. But you had a collection account?

A. Prior to that, yes.

34 Q. 26. You have got the book before you that shows the bank collection account?

A. No, I don't know that that is so. I don't know that there are any items before that. I don't know that fact; I will ask Mr. Brennan and find out. We had a meeting at which that was submitted on May 24—a regular meeting of the board of directors, held at 11 Pine street. (Reads.)

A copy of which minutes is hereto attached, marked Exhibit 12.

Q. 27. State what, if anything, in regard to those matters occurred at that meeting.

Mr. HERRON: That I wish to object to as incompetent.

A. I read the letter of Mr. Harper to the board; presented it to them as an application on the part of the Fidelity National bank for a loan, with the understanding that it should apply and be counted as a part of their reserve, and would remain with us as part of the reserve of the Fidelity National bank. After some discussion as to its terms, we passed the discount with that understanding, that the amount should go to the credit of the bank, and it was under-

stood on the part of our board at the time that it was to be so retained and held for the purpose stated in Mr. Harper's letter.

Mr. HERRON: Now I want to insert an objection to that as incompetent and irrelevant.

Deponent reads letter of May 6th, 1889.

Mr. HERRON:

Q. 28. The letter of April 28th was answered, then, under date of May 6th, 1887?

Mr. GRAHAM:

Q. 29. Was there any proposition made at that meeting in
35 regard to a loan of E. L. Harper?

Same objection by Mr. Herron.

A. No, sir.

Q. 30. Did you understand these letters at the time of their receipt as applying for a loan on behalf of E. L. Harper?

Same objection by Mr. Herron.

A. No, sir.

Q. 31. In whose behalf did you understand the loan to be applied for?

Same objection by Mr. Herron.

A. The Fidelity National bank.

Q. 32. After the loan was approved you received a letter from Mr. Harper—it is already in—of May 26, with enclosures; were those enclosures received?

A. They were; yes, sir.

Q. 33. What was done upon their receipt?

A. We instructed—(reads letter of May 28).

Q. 34. Was the Fidelity bank so credited with that sum?

A. It was, May 28th.

Q. 35. Is that a transcript of that account, Mr. Jordan?

A. Except the subsequent part in charging it up. It don't formally appear on a ledger in that way. It is the charge, however. It is an accurate transcript of the balance.

Q. 36. I see by this that the full amount of this $200,000 was credited to the Fidelity bank.

A. Yes.

Q. 37. How was the discount paid?

A. I think E. L. Harper's personal check.

36 Q. 38. Was the sum of money $200,000 afterwards paid out to the Fidelity bank?

A. It was upon their drafts—$75,000 on June 3, $100,000 on June 4, $20,000 on June 17th, making $195,000, with some charges for collection. There are two collections.

Q. 39. Then these are copies of the drafts upon which these payments were made?

A. The $20,000 signed Hopkins.

Mr. HERRON: Copies of the drafts are hereto attached, numbered 13, 14, 15.

Mr. GRAHAM:

Q. 40. These checks were paid in the ordinary course of business?
A. In the ordinary course of business, to the banks therein, or rather thereon, named.
Q. 41. Mr. Jordan, is this one of the letters transmitting the amounts received in payment of interest? (Hands paper.)
A. No, I think it is for collection—no, sir; that is for collection. The next one states the one received with enclosure.

Copies annexed, marked Exhibit 16.

Q. 42. Was any portion of that sum of $200,000 paid out upon the drafts of Harper, or applied as credits to Harper?
A. No, sir.
Q. 43. Or to any other person than the Fidelity National bank?
A. No, sir; paid upon the drafts.
Q. 44. Paid upon these drafts that have been mentioned?
A. Yes, sir.
Q. 45. And I suppose it is useless to ask you whether it has ever been refunded to you.
A. Decidedly no.
37 Q. 46. Had the bank at that time or at any time any business transactions with E. L. Harper?
A. No, sir.
Q. 47. Or with A. P. Gahr?
A. No, sir.
Q. 48. These are the notes of A. P. Gahr that are referred to in the letter of Harper; are they the originals or copies?
A. They are the originals. (Copies annexed marked 17, 18, 19, 20.)
Q. 49. These notes were duly protested as they became due by the notes of protest annexed to them?
A. Yes, sir.
Q. 50. What become of the bank stock that was offered as collateral for this loan?
A. It should be in the custody of the bank.

Mr. GRAHAM: I think it is actually in the hands of Mr. Harmon, counsel.

Q. 51. What was the value of the bank stock?
A. At that time?
Q. 52. Yes.
A. At that time the market value was 153.
Q. 53. That is of genuine stock of the bank?
A. Genuine stock of the bank.
Q. 54. Have you since ascertained whether these shares were genuine stock of the bank?

A. They are not, with the exception of a few shares.
Q. 55. And what is the present value of the stock?
A. Nil.

Objected to by Mr. Herron.

Q. 56. Had you at that time any information in regard to the solvency or commercial responsibility of A. P. Gahr?
38 A. None whatever.
Q. 57. Had you any knowledge whatever concerning the man?
A. None whatever.
Q. 58. Has your bank ever made any discount for the credit of either Gahr or Harper?

Objected to by Mr. Herron.

A. No, sir.
Q. 59. What was your understanding of the purposes of the Fidelity bank in making this loan?

Objected to by Mr. Herron.

A. I understand that it was intended to keep a reserve with us as one of its reserve agents, and that it was not to be drawn upon. I so stated to the board.

Answer objected to by Mr. Herron as incompetent and irrelevant.

Q. 60. Is it an unusual thing for banks to borrow moneys for such purposes?
A. No, sir; I made such a loan within the last two days to a Philadelphia bank.

Objected to by Mr. Herron.

Q. 61. What is meant among banks by the term "collateral notes"?
A. That there shall be attached to such notes something besides the responsibility of the maker of the paper.
Q. 62. Collateral notes is col-ateral to another person's debt?

Objected to by Mr. Herron.

A. No; not usually; it may be so.
Q. 63. I notice, Mr. Jordan, that these notes of Gahr are not indorsed by the Fidelity National bank or by any officer thereof as such. Will you explain how that happened?

Objected to by Mr. Herron.

39 A. So far as I was concerned, it is an omission; but still we do discount notes without indorsers—that is, without an indorsement. We have a form of guarantee, but we considered the letter of the bank a sufficient cover.
Q. 64. You were just saying, Mr. Jordan, that sometime- loans were made without an indorsement, but in those cases the loans are nevertheless actually made?

A. Actually made and credited to the banks.

Objected to by Mr. Herron.

Q. 65. What was the reason of such omission?

Objected to by Mr. Herron.

A. Accident in part, and what you might call rush of business in another. The bank requested the loan, and there was no time to require the necessary formalities, and we made the loan as they requested.

Answer objected to as incompetent and irrelevant.

Q. 66. There are also charges of $77.19 and $375 in the account hereto testified?

A. Those are for collections sent the bank collected by them and not remitted for.

Mr. Herron: I presume there has been no rejection of that part of the claim.

Q. 67. And will you explain these discounts?

A. The first credit is the discount for $200,000, the second is the interest on the account to May 31, and on September 30, interest on the balance left of $849. The debit balance is $195,415.37.

Q. —. These are credits carrying interest at 2% in accordance with the arrangement made with the Fidelity for this purpose?

A. Yes, sir.

40 X examination by Mr. Herron:

Q. 68. Mr. Jordan, in what shape were proposals presented to the board for their action?

A. In the shape of letters, or by the actual presentation of the securities themselves.

Q. 69. Was there a list of such applications presented to the board each meeting?

A. No, sir; we never made any list. The only list was that of the discounts which had taken place in the intervals of the board meetings.

Q. 70. There would be no list of proposals for discounts to be acted upon?

A. No, sir.

Q. 71. Was there any list of those notes presented to the board of action?

A. The letter itself, stating the securities was presented to the board. There were no securities presented to the board. The proposition was made for discount. The proposition was laid before the board and was acted upon before the notes were received.

Q. 72. Then the notes and securities were never presented to the board for its action before they were acted upon?

A. No, sir; the proposition was.

Q. 73. When a loan or discount is made in your bank, in what book is the first entry of it made?

A. In the "discount book."

Q. 74. You will please furnish that book for examination and also furnish a copy of the entry in the book to be attached to your answer and marked —

41 Copies of entry in discount book is hereto annexed, marked Exhibit 21.

A. Yes, sir.

Q. 75. Is there any other entry of this loan, except what is entered in that book?

A. It goes in what is called the "bill book." The bill book is now before me and I identify the account at page 180. A copy of the entry from the bill book is hereto annexed, marked Exhibit 22.

Q. 76. What book did you call that book?

A. That book is called the bill book for bills discounted; bill book is the title.

Q. 77. Do you keep what is known to us as a "tickler"?

A. Yes, sir.

Q. 78. Will you please produce that book? What do you understand by a "tickler"? What are the purposes for which a "tickler" is used in banks?

A. The tickler is to identify the notes on the day of payment; that is all.

Q. 79. Will you please produce the "tickler" in which the notes of Mr. A. P. Gaur were entered and attach to your answer copy of the entry as it appears on that book?

A. Yes, sir.

Copies of the entry on that book is hereto annexed, marked Exhibit 23.

Q. 80. Can you explain the mark in red ink on that book of charges to time loans June 20?

A. Yes, sir; we charged this to time loans on that day because of the fact that we had had no place to carry it except in bills discounted, and we turned it over to time loans instead of bills

42 discounted with a number of other notes of a *little* character. The "time-loans" account was opened on June 20th for the first time.

Q. 81. But the paper was not due at that time?

A. No, sir; I can't understand that myself, because that ought not to have been transferred until September 12th. The notes were due on the 4th of June—that is, we made the notes payable after four months. I think there was a difference between the two letters: I have no other memory of it than I suppose the form of the note, which is unusual; it is payable on time at any time after four months, and which made its date of payment uncertain.

Q. 82. You will find it on May 28th.

A. That has been an error on the part of the clerk. My explanation of it is this, that is is entered in a different method from the ordinary course. In the ordinary discount we take the money out. You will find that all these entries are carried out in this way, as

we didn't get paid money for the interest at the time the loan went into time loans. The discount goes here (indicating) and goes to an account called discounts received.

Q. 83. Do you keep a book called "time-loans book"?

A. Yes, sir.

Q. 84. Now, what entry was made of this transaction at that time in that book? Attach a copy of the entry to your answer.

A. May 28, E. L. Harper entered in the book on June 20th, with other loans of the time the time-loan account was opened.

Q. 85. Will you please attach to your answer an exact copy of the entry from the time-loan book?

A. Yes, sir: a copy of the page on the time-loan book is which this discount is included is hereto annexed, marked Ex. 24.

43 Q. 86. What entry at the time the loan was made was made as to the discount?

A. There was no interest entry made to the discount: it came by remittance and was credited afterwards.

Q. 87. Can you furnish the entry which was made as to the entry of the discounts on these notes?

A. Yes, I can: a copy is hereto annexed, marked Exhibit 25.

Q. 88. Is not June 20th the day on which the Fidelity National bank actually failed?

A. It may be—no, I think not: I think it was before that.

Q. 89. It didn't open on the 21st?

A. I was there on the 19th—I think it was. When we began *the* we kept the time loans in a different way. The first entry is May 28: that is in bills discounted. The next is June 20th, in time loans. These transfers to time loans were actually made on June 20, but the dates of the original transactions were preserved.

Q. 90. Were entries of this transaction made in any of the books of the bank except these entries in the time-loans and discounts books which you have identified?

A. General debit book, general credit book, tickler, bill book, time-loan book, general ledger, bills discounted and the banker's credit and debit books.

Q. 91. And you will attache copies from all these different books as to the entries which were made in reference to this matter?

Copies attached, marked Exhibit- 26, 27, 28, 29, 30.

A. Yes.

44 Q. 92. When the application contained in Mr. Harper's letter of May 16th was received by the bank, were you at home at that time?

A. No, sir.

Q. 93. How soon after its reception did you return?

A. I should say about the 20th.

Q. 94. At what time was the matter presented to the board?

A. May 24.

Q. 95. Can you —, without reference to the minutes, as to what directors were present at that meeting?

A. I can only remember one or two.

Q. 96. State who they were.

A. Mr. Gogorza, and I think Mr. C. J. Canda and Mr. F. E. Canda. Mr. Matthiessen, I think, was there, and Mr. Tilney; that is about all I remember.

Q. 97. Would you have remembered that all these gentlemen were present at that meeting had you not read the minutes of the meeting since?

A. No, sir; Mr. Tilney and Mr. Matthiessen came to my memory through reading; the others I did know.

Q. 98. Had the Western National bank at that time been appointed a reserve agent for the Fidelity?

A. My impression is yes. I will not answer positively, but I think so.

Q. 99. Had you seen Mr. Harper personally, or any officer of the bank, in regard to this loan?

A. No, sir.

Q. 100. All your knowledge, then, comes from the letters copies of which you have attached to your answers?

A. Yes, sir.

45 Q. 101. What amount of stock did Harper have in the Western National bank at that time?

A. I could not answer readily, but I should think 100 shares.

Q. 102. Up to that time had you had any transactions of any kind with the Fidelity National bank?

A. I think one or two, in remittance and exchange; none other.

Q. 103. Had you any account with the Fidelity on your books prior to that time?

A. Except as to remittances, no.

Q. 104. What was the amount of stock in Harper's name, 100 shares?

A. E. L. Harper, 100 shares.

Q. 105. That remittance is May 31, that you spoke of—the Indiana matter?

A. Yes; it is.

Q. 106. But up to May 28, had any transactions between the Fidelity National bank and the Western National been entered on the books of your bank?

A. There must have been one of $1,500 in payment of the first instalment on our bank capital stock.

Q. 107. Well, was that transaction with the Fidelity National bank or E. L. Harper individually?

A. It is here E. L. Harper, vice-president.

Q. 108. Would an entry of that transaction appear upon the books of your bank?

A. Yes; in our capital account.

Q. 109. Would not that entry be with E. L. Harper, Briggs Swift, and Mr. Weirs?

A. No; the entry would be what we sent back here in the letter to bank.

Q. 110. The Fidelity National bank had no interest in your stock?

46 A. Not that I know of.

Q. 111. Do not your books show that there was no account kept with the Fidelity National bank until this discount was made on the 28th of May?

A. I will answer this to-morrow. I think not, but will correctly answer if I find that I have not made the proper statement.

Q. 112. What amount was paid by Briggs Swift on account of the 1,600 shares of stock which were sent as collateral to those notes?

A. $75,000 and the fees.

Q. 113. That was paid in settlement of the suit which was afterwards brought against Mr. Briggs Swift in the superior court of Cincinnati, was it not?

A. It was.

Mr. HERRON:

Q. 114. According to the custom of your bank, when notes are discounted what marks are made on the paper to show that fact?

A. A number is put upon it: that is all: I don't know whether we mark them "B. D." or not. There are no marks at all except the number, in its order.

Q. 115. Look at the four notes of A. P. Gahr, about which you have testified, and see whether they are marked in that way.

A. They are marked "B. D." (bills discounted).

Q. 116. I think they all have "B. D." that way, if we can get at it. What is the number on these notes?

A. 201, 202, 199, 200. That is what they are. "B. D." from 199 to 202.

Q. 117. Those marks, those marks and letters, about which you have testified in your last answer were the marks and letters used by the bank at that time to indicate that these were bills

47 discounted?

A. Yes, sir.

Re-examination:

Q. 118. Mr. Gordan, were there at that time other loans of the same character as the present one?

A. Not at that time, but one or two *individuality* afterwards.

Objected to by Mr. Herron as incompetent and irrelevant.

Q. 119. Whom were they made to?

A. Made to a bank in Detroit, and one other I can't remember.

Q. 120. Will you state more generally the form in which those loans were made?

A. They were on the stock of the bank and kept as a reserve, with the stipulation not to draw the balance down below that. The entry in time loans on June 27 is No. 29, T. W. Hayes, June 29, $50,000.

Q. 121. Now, was that loan made in fact to Hayes or was it made to the bank?

A. Made to the bank, to be kept as reserve, and was so kept.

Q. 122. And other loans have been made to banks in the same way since that time?

A. Yes, sir.

Q. 123. Is there any reason for not making time loans to banks?

A. According to our theory in New York, yes. We do not believe it legal to make time loans to banks.

Q. 124. How are loans made to banks?

A. Either by a certificate or by officers individually making the loans and indorsing them and having them placed to the credit of the bank.

48 Objection to this testimony by Mr. Herron.

Q. 125. What is the usual occasion of banks making loans, borrowing of money?

A. Sudden call on them for deposits by their customers, short need, or in order to make and keep their reserve full, as required by law with the national banks.

Q. 126. It is not unusual, then, to make loans to national banks to remain on deposit with the view of making reserves?

A. No, sir.

Q. 127. What was your understanding at the time with regard to the purpose of this loan?

Objected to by Mr. Herron.

A. I understood that it was to be kept for the purpose of reserve, from Mr. Harper's letter.

Q. 128. From the Fidelity National bank?

A. From the Fidelity National bank.

Q. 129. Did you observe that some of these letters of Harper's were signed with an addition of V. P. for vice-president, and that *that* some were not so signed?

A. I did not notice that omission at all. I assumed that they were official.

Answer objected to for the same reasons as before.

Q. 130. The letters were all upon the official papers of the bank?

A. Yes, sir.

Q. 131. Is it not a very frequent practice for bank officers to write letters upon the business of their banks without the addition of their official titles?

A. I don't like to say that. I should suppose in that case
49 the *the* omission was accidental; it very frequently occurs. It frequently occurs that officers will omit their signatures on drafts and the banks will credit them to each other, upon the letter of remittance being presented with the draft.

Q. 132. Was this discount after it was made reported to the board of directors?

A. It was.

Q. 133. At what meeting?

A. It was passed at a board meeting on the 24th, and it was read on the 31st—May 31, it was read and approved.

Q. 134. Mr. Jordan, will you explain the tag which is pinned to this letter: "Please place the full $200,000 to credit; advise me of the amount of interest and I will send check." In what letter was that received?

A. My own impression is, Mr. Graham, that that came with the letter of May 26.

Mr. GRAHAM:

Q. 135. After the drafts came in from the Fidelity drawing the money which is credited in this transaction, did you write to the Fidelity bank remonstrating as to their drawing the fund?

A. I did.

Q. 136. This is a copy of the letter?

A. Yes, sir; dated June 9, copy of which is hereto attached, marked Exhibit 31.

Q. 137. Did these checks pass through your personal hands?

A. No, sir; except the last one.

Q. 138. Would these checks have been paid if they had passed through your hands?

50 A. No, sir; I should have declined to have paid them. I will explain: I watched the account from the day of the discount until the first of the month and I found these two drafts paid. When the $20,000 one came in I discovered that two had been paid through what I considered the fault of a clerk, though I blamed myself because I did not have a memorandum put on the ledger not to be paid. I paid the one of the 17th because the other two had been paid, and started immediately for Cincinnati.

Q. 139. Have you informed yourself further about the manner in which the interest was paid since yesterday evening?

A. I have. I sent to the Chemical National bank and ascertained that the check was a Fidelity National bank check upon them received in letter of May 31, 1887. I am pleased to say I was absent at the time—that is, at the time of the presentation of those drafts.

Q. 140. Were you appointed by the Comptroller a reserve agent of the Fidelity bank?

A. Yes, sir.

Q. 141. Have you since yesterday examined the collection account to see whether there were any transactions with the Fidelity bank prior to this loan?

A. I have, sir.

Q. 142. And with what result?

A. We had several collections that had been remitted to them and paid for prior to the opening of the regular account.

Q. 143. Mr. Jordan, I think it was testified yesterday that these Gahr notes were received by you and handed to Mr. Blankenhorn?

51 A. No, I don't think it was testified.

Q. 144. But what was the fact?

A. In the first place, they were brought before the board; that

letter was passed May 24; I am conscious of the fact that they were handed over to Mr. Blankenhorn.

Q. 145. Then the Gahr notes did not come into your personal hands?

A. Yes; I had them. I passed them to the cashier, Mr. Blankenhorn.

Q. 146. Did you make any examination in regard to the endorsements at that time?

A. No, sir; except as to the fact that they were endorsed by Mr. Harper.

Q. 147. What is the routine in regard to the entries made in the books which we have produced?

A. The entries go to the cashier, who in turn distributes to the clerks who have charge of the different departments—some to the correspondence clerk, some to the discount clerk, and some to the time loan and demand loan.

Q. 148. Are those charges made from memorandum or ticket, or made directly from the bills?

A. They are made directly from the bills.

Q. 149. By whom was this entry in the time-loan book made?

A. By Mr. Otto Ruhl.

Q. 150. And according to the usual course of business he would make that entry from the *b*ill itself?

A. Not in this case. You ask me about the time loan; the entry was made originally in bills discounted, by Mr. Andras, the discount clerk; I went to Mr. Andrus, the discount clerk.
52 Mr. *Mr.* Otto Ruhl did not make these entries until the 20th of June. I want to call attention that the name of Harper is not entered in the discount book; it is entered in the time-loan book.

Q. 151. Mr. Ruhl would make the entry from the actual facts right before him?

A. From the obligations themselves.

Q. 152. This paper produced is the original "charge ticket"?

A. Yes, sir.

Q. 153. Made by whom?

A. Made by Mr. Andrus.

A copy of the paper is hereto attached, marked Exhibit 32.

Q. 154. By the way, there is an erasure in this paper.

A. Well, that don't make any difference; the paper is straight enough.

Q. 155. Would the books have proved if this entry had not been made, as stated in this tick-er, of $200,000?

A. No, sir.

Q. 156. Where is Mr. Ruhl now?

A. Sick somewhere on Long island.

Q. 157. Is he in such state of health that his deposition can be taken?

A. I think that he is very ill, that is all.

Q. 158. And Mr. Blankenhorn?

A. Is at death's door.

Q. 159. What were the two books that had the name of Harper in?

A. Time loan and general ledger.

Q. 160. And is the entry in the general ledger entered from the time-loan accounts?

A. From the entry in the book of time loans. The entry
53 will be *be* in the general debit book; goes from the general debit book in the general ledger.

Q. 161. You were asked about the payments that were made by Mr. Briggs Swift in settlement of his suit brought at Cincinnati. Upon what account was that suit brought?

A. Account of suit brought against him on the liability as to issuing fraudulent certificates.

Q. 162. Was that settlement made on account of the debt?

A. No, sir.

Q. 163. How was this sum of $75,000 reached in computation?

A. By assuming that the product of the dividend on the principal amount in the bank would leave about so much, and that would give us our debt.

Q. 164. And this sum of $75,000, then, was intended to cover the damages caused by Swift's action?

A. Yes, sir.

Recross-examination.

Mr. Herron:

Q. 165. In the case of loan of $50,000 to T. W. Hayes, what evidence had the bank?

A. The note.

Q. 166. Whose note?

A. Mr. Hayes's note, made by him.

Q. 167. And secured by collateral in the bank belonging to Mr. Hayes?

A. I assume belonging to Mr. Hayes.

Q. 168. That note was paid at maturity, was it?

A. It was.

Q. 169. You stated that you declined to make time loans to banks, did you not, because you deemed time loans to banks as illegal?

54 A. Yes, sir.

Q. 170. What answer did Mr. Harper make to your letter of June 9?

A. His reply is before me and under date of June 13th.

Q. 171. Copy of which is made part of your answer, marked Exhibit 33. Had you any understanding as to the character of this loan, except what you gathered from the letters of Mr. Harper which have been made a part of your deposition?

A. No, sir.

Q. 172. In presenting the application for this loan to the board, did you present anything to the board except Mr. Harper's letter of May 16th?

A. In the first instance, no, sir.

Q. 173. Did you at any time present anything else to the board?

A. It is my impression that I did, or to the committee; my memory is quite strong as to the fact that I held these papers and turned them over to the cashier in the ordinary routine, and in doing so they were passed by me to him without any other direction than to do as the board had requested.

Q. 174. In that case you presented, either to the board or to the committee, Mr. Harper's letter of May 26, and the four notes of A. P. Gahr, and the four certificates of stock for four hundred shares each?

A. Yes, sir.

Q. 175. Then to the committee or board at that time you presented nothing else except those papers?

A. No, sir.

Q. 176. And it was on those papers that the discounts were made?

A. Yes, sir. I think I ought to say, however, that the discount was made at the board meeting before May 24th, the date of
55 our advice under that letter.

Q. 177. On May 24, then, when you say the discount was actually made, the board had nothing before it except Mr. Harper's letter of May 16th?

A. That is all.

Q. 178. And at that time the bank had not been appointed reserve agent?

A. That is my impression.

Q. 179. On the charge ticket about which you have testified, the names of the parties on the first line are the parties to whom the proceeds are to be credited, is it not?

A. Yes, sir; the first item—cashier's account—William Sachs & Sons. We would make a purchase from William Sachs & Sons of so much paper and would give a cashier's check for so much; that check would go to the credit of cashier's account. William Sachs is a broker. These notes are all from him. Instead of going to the credit of Sachs, this goes to the credit of an account known as cashier account.

Q. 180. In that case were William Sachs & Sons endorsers on the paper?

A. No, sir.

Q. 181. And were not liable on the paper which is first named there?

A. No, sir.

Q. 182. Their names are entered on your discount book as the persons offering the paper, though, are they not?

A. Yes, sir.

Q. 183. Read it as it appears on your discount book.

A. Credit—cashier account, officer—William Von Sachs & Sons, three acceptances I. B. Vicini & Co.; net proceeds, $4,925.83.

Q. 184. The entries of the Fidelity of the same day, to
56 whom are they credited upon that day?

A. They are credited upon the memorandum "direct" to the Fidelity National Bank of Cincinnati.

Redirect examination:

Q. 185. Was Sachs & Sons a discount for their account or was it a purchase?

A. No, sir; it was a purchase.

Q. 186. They are bill brokers?

A. Yes, sir.

Q. 187. Whose only interest in the paper is their commissions?

A. That is all.

Q. 188. And how is it in the other party, Eaton, Cole, Burnham & Co?

A. They had a regular discount which was credited to them direct, the proceeds being $15,045.43.

Q. 189. Mr. Herron spoke about a loan to Hayes; was that made to Hayes or to the Detroit bank?

Objected to by Mr. Herron.

A. It was discounted to the bank.

Q. 190. Who made that loan?

A. The bank.

Q. 191. Who paid it?

A. The Detroit bank.

Q. 192. Something has been stated of a committee to whom these papers were referred.

A. We have a discount committee who see and receive applications in the intervals of the board meetings.

Q. 193. Who were the committee at that time?

A. That is more than I remember. Mr. Gogorza was a member at that time. My impression is that Mr. Gogorza was a member and Mr. Canda.

57 Q. 194. And they acted as general advisers of officers of the bank?

A. Yes, sir.

Mr. HERRON:

Q. 195. You say that the bank paid Mr. Hayes' note; how do you know that?

A. From the fact that the remittance was from the bank.

Q. 196. That is the only knowledge you have on the subject?

A. I had knowledge by letter.

Q. 197. That the bank remitted the money?

A. That the bank remitted the money.

Mr. GRAHAM:

Q. 198. That instance of a bank borrowing money, was it a solitary one?

A. No, sir; there have been a number of them of the same character.

Objected to as incompetent by Mr. Herron.

Q. 199. Why is this case particularly mentioned?
A. Because the account was closed out.

WITNESS: At the request of Mr. Herron I state that the endorsement on the back of the four notes of Gahr is not in the handwriting of any person in this bank.

C. N. JORDAN.

58 CHARLES J. CANDA, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination by Mr. GRAHAM:

Q. 1. What is your age, residence, and occupation?
A. Banker; my age is 52; my residence, New York city.
Q. 2. Were you, in April, May, and June, one of the directors of the Western National Bank of the City of New York?
A. In 1887? Yes, sir.
Q. 3. Were you present at a meeting of the board of directors held about May 24, 1887, at which the question of a proposed loan made, it is claimed, to the Fidelity National Bank of Cincinnati was under consideration?
A. I was. I will say with reference to the date that we can verify it by reference to this book (indicating).
Q. 4. Will you state what occurred in that connection at that meeting of the board?

Objected to — Mr. Herron.

A. Mr. Jordan presented an application for a loan from the Fidelity bank for $200,000 and read a letter which he had received in connection with it.
Q. 5. Is this letter of May 16 the letter which was read at that time?
A. Yes, sir; this is doubtless the letter (Ex. No. 6).
Q. 6. Was the loan approved by the board?
A. It was; he was authorized to make the loan to the bank.
Q. 7. To whom?
A. To the Fidelity National bank.
59 Q. 8. Was there any consideration at that time of any loan to E. L. Harper?
A. No, there had never been any business done with E. L. Harper.
Q. 9. Had you personally any knowledge of the financial responsibility or standing of Harper or Gahr at that time?
A. No, sir; never heard of Gahr until the proposition came up; had heard of Harper.
Q. 10. Would that loan have been made to Harper?
A. I don't believe so—at least, not with my consent. I did not know either of those parties.

All of the above testimony is objected to by Mr. Herron as irrelevant and incompetent.

Q. 11. But did consent to the loan?

A. To the loan to the bank? Yes, sir.

Q. 12. Were you a member of the discount committee at that time?

A. No, sir; I don't remember. The thing came before the full board; I was not then an officer of the bank; I was subtreasurer at that time.

Q. 13. Were you present at the meeting of the board, May 31st, 1887?

A. May 31st I am reported as being present and doubtless was; in fact, it appears I was chairman of that meeting.

Q. 14. Was a list of discounts made during the previous week read at that meeting?

A. Yes, sir; they always are.

Q. 15. Was a list made up?

A. All books are invariably read at every meeting.

Q. 16. And read as a loan made to whom?

A. To the bank.

60 Q. 17. What book was produced at the directors' meeting?

A. All books of all the business we did for the week. There is a time-loan book and a call-loan book and bills discounted. Here is the entry as it read in the discount book under date of Saturday, May 28, 1877: Direct to the Fidelity National bank, Cincinnati, Ohio.

Cross-examination.

Mr. HERRON:

Q. 18. Mr. Cauda, what is your connection with the Western Nat'l bank now?

A. Vice-president.

Q. 19. In May, 1887?

A. I was then director. I was then ass't treasurer of the United States at New York.

Q. 20. When did the question of this loan first come before the board?

A. As I have testified, on the 24th of May, 1887. I take that date from the books; I can't remember that.

Q. 21. At that meeting the letter of Mr. Harper of May 16 was read to the board by Mr. Jordan?

A. By Mr. Jordan.

Q. 22. Was anything else presented by him to the board in connection with this loan except this letter?

A. I don't remember.

Q. 23. Had you anything else except that letter?

A. I don't know that we had anything else; I don't believe we did have.

Q. 24. Was any entry made upon the minutes of that meeting with reference to that matter?

A. No, sir; it is not customary.

Q. 25. At that time what did you know in reference to the
61 Fidelity National bank?

A. Nothing but its reports.

Q. 26. Had you any knowledge as to its stock?

A. No, sir; I had no personal knowledge except that they were a national bank and under Government supervision—had a credit which other institutions did not have.

Q. 27. Had you any knowledge as to the value of their stock?

A. No, sir; excepting what was stated in Mr. Harper's letter.

Q. 28. In Mr. Harper's letter?

A. You asked me as to whether I have any personal knowledge; I have not.

Q. 29. Has your bank loaned money on bank stock?

A. In some instances; yes, sir.

Q. 30. How did you ascertain the value of the bank stock in making loans upon them?

A. Oh, well, the general character of the institution, and to a certain extent here, you know, we have quotations.

Q. 31. Where bank stocks have a market value are you willing to loan money upon them?

A. Not always, from a great many reasons; we might not want to loan to the individual.

Q. 32. Mr. Harper was a stockholder of your bank at that time, was he not?

A. That I do not know, sir; he may have been.

Q. 33. Had you heard of him before?

A. I had heard of him, but knew very little about him. He was in the iron business.

Q. 34. Had you not heard that he had the reputation of being very wealthy?

62 A. Well, I had heard that he was, and at the same time that he was not. I had been the treasurer of an iron company with which he had had transactions.

Q. 35. You knew that he had the reputation of being a large owner of property, did you not?

A. No, I did not know that; I heard that he claimed to have some means, but I was not satisfied of it by any means.

Q. 36. But as you had business in this iron company, you had business transactions with him.

A. Very little; personally I did not come in contact with him.

Q. 37. How long had you heard of him as an iron man?

A. Oh, I could not say, sir. He was a very active fellow in sending circulars around.

Q. 38. Did you *made* any examination as to the financial condition of the Fidelity bank?

A. No, sir; not any personal examination; but as I told you, it was a national bank, and we deal with national banks on a different footing than we do with ordinary things. A national bank with the capital of a million and a prospect of another million gave them a pretty good credit.

Q. 39. Did you know whether it had actually increased its capital to another million or not?

A. No, I did not know, but I was reported that they were going to or were about to.

Q. 40. Had you any knowledge of the value of the stock except such as was contained in Mr. Harper's letter of May 16th?

A. No, sir.

Q. 41. Do you remember at the meeting of May 31, 1887, what books were presented to the board at that time?

A. The book of minutes and I think the books of bills dis-
63 counted, time loans, and demand loans; they are invariably before us at meetings.

Q. 52. And those three books were read at the meeting of May 31, 1887?

A. Yes, sir.

Q. 43. Do you remember seeing the time-loans book at that time?

A. I have no doubt that it was there at that time. Here is a memorandum that was made in good faith, and it says that I was present on that day.

Q. 44. Well, now, do you remember seeing at that time the time-loans books?

A. I cannot say that I remember, but I have no more doubt that it was there than that I am talking to you.

Q. 45. Do you remember being at the bank on May 28th, 1887?

A. No, sir.

Q. 46. Were you in the habit at that time of being at the bank if not at a meeting of the directors?

A. Not at that time—I was subtreasurer—I may have come into the bank.

Q. 47. When did you first see the 4 notes of A. P. Gahr endorsed by E. L. Harper?

A. I don't know that I have ever seen them until now.

Q. 48. Did you ever see the letter of Harper in which those letters were enclosed?

A. I don't think I did, sir.

Q. 49. Then you have no recollection of this transaction after the directors' meeting of May 24?

A. I heard it afterwards, but I had nothing to do with it, except as a director, to authorize it as a director, and know that it was done as a director afterwards.

64 Q. 50. Had you any knowledge of its being done except as entered in the books and the officers of the bank?

A. That is all.

Q. 51. You did not see the papers themselves?

A. No, sir.

Redirect examination:

Q. 52. Mr. Canda, will you please refer to the time-loans book—will you refer to this book, and can you say that this book was produced at that meeting?

A. Well, I can't say whether it was produced or not; it was time loans.

Q. 53. Refer to the call loans and see whether that was not the book that was produced?

A. It may have been produced; I say that the loans were read and approved in the usual way.

Q. 54. Is there anything in this book that indicates the time that it was made up?

A. I have stated that there were three books; now it may have been that at that time there were but two books.

Q. 55. Do you know how that comes to be entered in the name of E. L. Harper (indicating in time-loans books)?

A. No, sir; I don't.

Q. 56. After referring to the books, the book that was read was the discount book with the entry to the Fidelity National bank?

A. Yes.

65 Recross-examination:

Q. 57. Do you remember now that no other book except that book was read to the directors?

A. No other book with reference to that entry, as a matter of course. The discount book is the one in which the entry of that transaction is made of record.

Q. 58. Was there no other book produced at that meeting of the board except that discount book?

A. I cannot tell you; that is too far back.

C. J. CANDA.

66 EDUARDO GOGORZA, of lawful age, being first duly cautioned — sworn, deposes and says as follows:

Direct examination by Mr. GRAHAM:

Q. 1. What is your name, age, residence, and occupation?

A. I am a merchant by occupation; I live in Summit, New Jersey.

Q. 2. What connection, if any, with the Western National bank had you in April, May, and June, 1887?

A. I was a director.

Q. 3. Were you present at a meeting of the board of directors May 24, 1887?

A. I missed two meetings since the bank started; that was during the blizzard and this one, May 31, so I must have been present—yes, sir.

Q. 4. State what occurred at that meeting, if anything, in relation to a loan claimed by the Western National bank to have been made to the Fidelity National bank of Cincinnati.

Objected to by Mr. Herron.

A. Well, this letter of May 16th was read, where they proposed to open an account here and to leave all the way from $200,000 up,

and I believe that there were to be discounts and general business, and I believe it was passed by the board.

Objected to by Mr. Herron.

Q. 5. Passed as a loan to whom?
A. To the bank.
Q. 6. To the Fidelity bank?
A. Fidelity National bank.
Q. 7. Was there any question at that meeting of any loan to E. L. Harper?

67 A. No, sir. Well, E. L. Harper was vice-president.
Q. 8. But to E. L. Harper personally?
A. No, sir.
Q. 9. Or to his firm?
A. No, sir.
Q. 10. Did you know anything about the financial standing and responsibility of Harper at that time?
A. No, sir.
Q. 11. Or of Gahr?
A. No, sir.
Q. 12. Did you vote to allow the loan?
A. Yes, sir.
Q. 13. Would you have voted for any loan to Harper?
A. No, sir.

Objected to by Mr. Herron.

Q. 14. Or to Gahr?
A. No, sir.

Objected to by Mr. Herron.

Q. 15. Or would the board have done so?
A. No, sir.

All of the above testimony is objected to by Mr. Herron as irrelevent and incompetent.

Q. 16. Were you one of the discount committee of the bank at that time or of the executive committee?
A. That I could not swear to.
Q. 17. Did you have anything to do with these notes of Gahr when they came in?
A. I had no other connection with it.

68 Cross-examination by Mr. Herron:

Q. 18. What knowledge had you of the Fidelity Bank stock at that time?
A. I had none.
Q. 19. Had you any knowledge of its general value in the market?
A. Well, I heard that the bank was a very excellent institution—good reputation.
Q. 20. Did you hear what its stock was worth?

A. Well, that is very hard for me to answer. I know it was worth a good deal above par, but how much premium I could not tell you.

Q. 21. At this meeting of May 24 did Mr. Jordan present anything to the directors except Mr. Harper's letter of May 16th?

A. I think that was so; he read the letter.

Q. 22. He read the letter?

A. Read the letter.

Q. 23. Did you not understand that by that letter there were to be four notes discounted?

A. I believe there were to be four notes discounted, to be kept as a reserve for the benefit of the park.

Q. 24. Did you not understand that Mr. Harper proposed to endorse these notes personally, and that in the letter reported himself to be worth $2,000,000?

A. No, sir.

Q. 25. Did you not understand that Mr. Harper proposed to leave 1,600 shares of stock of the bank as collateral for these four notes?

A. Yes, sir; for the bank.

Q. 26. And that in this letter he stated that the bank stock was worth 155 per share?

69 A. Something of the kind.

Q. 27. Did you see the notes that were sent by Mr. Harper to the bank for discount?

A. I saw and heard them read; whether I saw them or not—I could not swear to that.

Q. 28. How long was this after the meeting of the board when the letter was read?

A. Well, it was during the proposal for discounts—I could not say exactly how long.

Q. 29. Did you examine the proposals for discounts between the meetings of the board?

A. We look at the amounts of the paper that was presented, but I do not believe that that paper was presented at that meeting that I attended; only the letter was read there.

Q. 30. My question was whether you examined proposals or discounts—not at meetings of the board—between meetings of the board?

A. I don't think I did.

Q. 31. Are you certain that you ever saw these papers at all?

A. I am.

Q. —. And when?

A. That I cannot say. I think I saw that paper long after the failure.

Q. 33. You can refresh your memory by looking at it. Had you done so at the time that you discounted it?

A. No, after the failure; I just out of curiosity saw it.

Q. 34. Do you remember reading Mr. Harper's letter of May 16th yourself?

70 A. I was present and remember the nature of it.

Q. 35. Was the letter read in full?

A. The substance of the letter was that this bank was to open an

account with the Western National bank; that they were to be discounted; that they would keep a reserve here of 200,000, and that this was not to be removed or drawn from, and that was the shape that that transaction went through.

Q. 36. Well, my question was whether you read the letter at the time.

A. I did not read the letter myself.

Q. 37. Was the letter read to the board by Mr. Jordan?

A. It was.

Q. 38. Have you seen the letter since?

A. No, sir.

Q. 39. Did you form this opinion of its substance from what Mr. Jordan stated or from hearing the letter read?

A. From hearing the letter read and from the natural idea I have of the transaction.

Redirect examination:

Q. 40. Mr. Gogorza, were you present at the meeting of the board, May 31st?

A. I don't think I was.

Q. 41. Who was president of the bank at that time?

A. Mr. Manning.

Q. 42. Mr. Daniel Manning? Did Mr. Manning give personal attention to details of the bank at that time?

A. No; I could not say that he did.

Q. 43. Is Mr. Manning living?

71 A. Why, no.

EDUARDO GOGORZA.

HENRY A. SMITH, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Direct examination:

Q. 1. What is your age, residence, and occupation?

A. My age is 39; occupation, bank officer; residence, New York city.

Q. 2. What has been your connection with the Western National bank since May, 1887?

A. Occupying the asst cashier's position.

Q. 3. During the whole period?

A. The whole period.

Q. 4. You are familiar with the business of the bank?

A. Yes, sir.

Q. 5. Will you refer to the book known as the time-loans book? From reference to that, can you tell when that book was opened?

A. Yes.

Q. 6. What date was it?

A. It was opened on the 20th day of June, 1887; that is the register of time loans.

Q. 7. There are entries contained in it prior to June 20?

A. There are entries; yes.

72 Q. 8. Were those entries originally made in that book?

A. No.

Q. 9. Transcribed from some other book?

A. Transcribed from some other book.

Q. 10. What book?

A. Discount book.

Q. 11. The discount book contains the original entry?

A. Yes.

Q. 12. And this is a transcription made about June 20?

A. Made on June 20th."

Cross-examination by Mr. HERRON:

Q. 13. How do you fix the day when this transcribing was done?

A. Merely by the entries on the book.

Q. 14. Have you any personal recollection?

A. Yes; I recollect that it was about that time an order was given to transfer to time loans certain discounts that we had carried in bills discounted and that the entries on those time-loan books were made in carrying out those orders. It was a general order in regard to details of the bank that it should be carried in time loans instead of bills discounted.

Q. 15. Are those entries copies from another book?

A. Well, not literally.

Q. 16. Are they in any sense copies of entries made in any book?

73 A. Well, I said before they are not literally so; a change occurs in different style of books by the different rulings; they are practically the same, simply another form of ruling and lining.

Q. 17. By whom are those entries made?

A. By Otto Ruhl, a former clerk in this bank.

Q. 18. What was his position in the bank?

A. His position at that time was, I think, a general clerk; it was after the bank had been very shortly started, and he attended to the time loans and foreign exchange, I think, and other things that I do not recollect now.

Q. 19. How long was he connected with the bank?

A. I think until about the 1st of January, 1889.

Mr. HERRON:

Q. 20. From the time it opened?

A. Yes.

Q. 21. State whether that book was one of the books laid before the weekly meeting of the board.

A. The time loan?

Q. 22. Yes, at any time.

A. One of the books that are read at the meetings of the directors.

Q. 23. State whether that book was laid before the directors regularly at their meetings after it was opened.

A. Yes, sir.

Q. 24. Who gave Mr. Ruhl the instruction about making the entry in that book?

A. Mr. Jordan.

Q. 25. Had you anything to do with it?

A. I think not, except in following instructions.

74 Q. 26. Look at the notes of A. P. Gahr and state what the figures and letters on their back, B. D., 199, 200, 201, and 202, indicate.

A. They indicate that they were entered as bills discounted in the bills-discounted book.

Q. 27. These are the marks which your bank was in the habit of placing on the back of bills discounted, was it not?

A. Yes, sir.

Q. 28. Were you in the habit of placing those marks and such numbers upon any notes except such as were discounted?

A. No; not these marks.

Redirect examination:

Q. 29. All bills have a running number, have they not?

A. Yes.

Q. 30. And these 199 and so on are running numbers?

A. Those are the running numbers.

Q. 31. You stated that Mr. Jordan gave instructions to have this time-loans book made out. Do you know what those instructions were?

A. Not exactly; except in a general way.

Q. 32. What was the sense of them?

A. Simply carrying loans forward that he had discounted to the time-loans account, where they properly belonged.

Q 33. Did those instructions include details as to the nature of the entries to be made in particular cases?

A. No; oh, no.

Q. 34. Have loans of this class been entered in the discount book since the time-loans book was opened?

75 A. No.

Q. 35. Such loans were entered in the discount book until that time?

A. Yes.

Q. 36. Since that time no longer entered in the discount book?

A. No.

Q. 37. You were ass't cashier when the bank was first opened?

A. No; May 17, 1887; but I performed the functions of ass't cashier prior to that date.

Q. 38. Where is Mr. Ruhl now?

A. I believe he is on Long island some place.

Q. 39. Can you state any reason why we can't examine him?

A. Well, his brother told me a few weeks ago, three or four weeks

ago, that he was out of his mind. It is my belief that such are the facts.

H. A. SMITH.

76 STATE OF NEW YORK, } ss.:
City and County of New York, }

I, William S. Mathews, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Conrad N. Jordan, Charles J. Canda, Eduardo Gorgorza, and Henry A. Smith were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed as above set forth were reduced to writing by Henry E. Spachman, who is not interested in the suit, in my presence and in the presence of the witnesses, and were subscribed by the said witnesses respectively in my presence, and were continued from day to day as above set forth; said depositions were taken at the time and place specified in the notice and agreement of counsel hereto attached, and that I am not counsel, attorney, or relative to either party, or otherwise interested in the event of this suit.

I further certify that said witnesses and each of them live more than one hundred miles from the place of trial.

In testimony whereof I have hereunto set my hand and official seal this 31st day of March, A. D. 1890.

WM. S. MATHEWS,
Not. Pub. of New York Co., N. Y. [SEAL.]

77 Form 2.

STATE OF NEW YORK, } ss.:
City and County of New York, }

I, Edward F. Reilly, clerk of the city and county of New York, and also clerk of the supreme court of the said city and county, the same being a court of record, do hereby certify that Wm. S. Mathews, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 2nd day of April, 1890.

EDWIN F. REILLY, *Clerk.* [SEAL.]

78 EXHIBIT No. 1. Referred to in Deposition of C. N. Jordan. William S. Mathews, N. P.

Ans. May 6th.

U. S. depository.

The Fidelity National bank.

Capital, $1,000,000.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benjamin E. Hopkins, ass't cashier.

CINCINNATI, *April 28th*, 1887.

Western National bank, New York city, New York.

GENTLEMEN: We desire to offer our services in making collections or reciprocal business. We will collect all your cash items west of New York and remit for them the 5th, 16th, and 26th of each month in New York draft without charge for exchange. We would also be pleased to receive your best terms for part of our New York account and to know if you will credit our New England sight items on receipt at par.

Respectfully yours, E. L. HARPER, *V. P.*

79 EXHIBIT No. 2. Referred to in Deposition of C. N. Jordan. William S. Mathews, N. P.

Ans. & cert'f's sent 5, 10, '87.

U. S. depository.

The Fidelity National bank.

Capital, $1,000,000.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benjamin E. Hopkins, ass't cashier.

CINCINNATI, *April 30th*, 1887.

F. Blankenhorn, Esq., cashier Western National bank, New York city, New York.

DEAR SIR: Enclosed herewith we hand, in payment of 300 shares of your stock, certified checks on us, as follows:

Briggs Swift	$9,500 00
E. L. Harper	9,500 00
B. Weiss	9,500 00

Also three receipts for first payment of $500,00 each in names of Briggs Swift, E. L. Harper, and J. J. Almirall, regularly endorsed. Kindly make certificates of stock and return to us, as follows:

80 Briggs Swift..... 50 shares.
Do. ..... 50 "
E. W. L. Harper..... 50 "
Do. ..... 50 "
B. Weiss..... 50 "
Do. ..... 60 "

We trust you will accept our proposition of the 28th inst. to collect all your items west of New York or any part you may favor us with and remit in New York draft the 5th, 16th, and 26th of each month without charge for exchange, and you will start the account with the checks enclosed.

Yours truly, E. L. HARPER, *V. P.*

81 Dan'l Manning, president; C. N. Jordan, vice-president; F. Blankenhorn, cashier; H. A. Smith, ass't cashier.

Capital, $3,500,000.

The Western National Bank of the City of New York.

NEW YORK, *May* 6, 1887.

E. L. Harper, Esq., vice-pres't, Cincinnati, Ohio.

DEAR SIR: Referring to yours of April 28th and 30th, we would be pleased to receive your New York account on the opening of the bank, May 10th, allowing you interest and crediting it monthly at the rate of 2 % per annum, daily balances, and will credit on receipt at par "demand" items on Philadelphia, Baltimore, Boston, Providence, Albany, Troy, and all points in Connecticut and New Jersey.

Very truly, F. BLANKENHORN, *Cashier.*

Exhibit No. 3, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

82 Dan'l Manning, president; C. N. Jordan, vice-president; F. Blankenhorn, cashier; H. A. Smith, ass't cashier.

Capital, $3,500,000.

The Western National Bank of the City of New York.

NEW YORK, *May* 13, 1887.

E. L. Harper, Esq., vice-pres't the Fidelity Nat'l bank, Cincinnati, Ohio.

DEAR SIR: In further reply to your letters of May 10th and April 28th we would say that we will send out items to you for the present, but will want to know what our business at Cincinnati will amount to before making a permanent arrangement.

Thanking you for your attention, we are,

Truly yours, F. BLANKENHORN, *Cashier,*
Per BREMAN.

Exhibit No. 4, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

83 EXHIBIT No. 5. Referred to in the Deposition of C. N. Jordan. Wm. S. Mathews, N. P.

Ans'd 5, 13, '87.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cash.

U. S. depository.

The Fidelity National bank.

Capital, $2,000,000.00; surplus, $400,000.00.

CINCINNATI, *May 10th*, 1887.

Western National Bank of New York City.

GENTLEMEN: Please send us the stock certificates as requested in our- of the 30th ultimo, enclosing payment as follows:

Briggs Swift	50	shares.
Do	50	"
E. L. Harper	50	"
Do	50	"
B. Weiss	50	"
Do	50	"

Can you not accept our proposition to collect your items west of New York and remit without charge for exchange the 5th, 16th, and 26th of each month?

Respectfully yours, E. L. HARPER, *V. P.*

84 EXHIBIT No. 6. Referred to in the Deposition of C. N. Jordan. Wm. S. Mathews, N. P.

Answered May 20, 1887; answered May 24, 1889; answered June 9, 1887.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cash.

U. S. depository.

The Fidelity National bank.

Capital, $2,000,000.00; surplus, $400,000.00.

CINCINNATI, *May 16th*, 1887.

Western National Bank of New York City.

GENTLEMEN: Your letters of the 6th — 13th to hand. We are pleased to know you will send us your items for the present, under our propositions of April 28th and May 10th, and we will give your business our best attention.

At what rate will you take a loan of $200,000.00, secured by 1,600 shares of our bank stock, due $50,000 each 3, 4, 5, and 6 months,

and place proceeds to the credit of this bank, and the bank to designate you as one of their reserve agents and keep part of their New York account with you under your proposition of the 6th inst.? I will endorse the collateral notes and I am worth over $2,000,000 net. We have just doubled our capital stock, all paid in, and paid in $400,000.00 surplus, and this loan will give some of our principal stockholders time to turn. 155 is to-day bid and 160 asked for our stock. Our balance will no doubt average more than $200,000. I can also, if you desire, give you my firm account, Mess. E. L. Harper & Co., and send you some choice business paper from time to time.

While Mr. Swift and myself are only small stockholders with
85 you, we desire to give you all the business we can.

Your early reply will oblige,

Respectfully yours, E. L. HARPER.

86 EXHIBIT No. 7. Referred to in the Deposition of C. N. Jordan. Wm. S. Mathews, N. P.

Daniel Manning, president; C. N. Jordan, vice-president; F. Blankenhorn, cashier; H. A. Smith, ass't cashier.

Capital, $3,500,000.

The Western National Bank of the City of New York.

NEW YORK, *May* 18, 1887.

Personal.

E. L. Harper, Esq., president Fidelity National bank, Cincinatti, O.

DEAR SIR: Your favor of the 16th inst. is received and has attention.

Mr. Jordan is at present absent from the city, but we will hold over your letter until his return to-morrow.

Truly yours,

(S'g'd) F. BLANKENHORN, *Cash'r.*

87 EXHIBIT No. 8. Referred to in the Deposition of C. N. Jordan. Wm. S. Mathews, N. P.

Daniel Manning, president; C. N. Jordan, vice-president; F. Blankenhorn, cashier; H. A. Smith, ass't cashier.

Capital, $3,500,000.

The Western National Bank of the City of New York.

MAY 20, 1887.

E. L. Harper, Esq., president Fidelity National bank, Cincinnati, O.

DEAR SIR: In further reply to your letter of the 16th inst. I have to say that the proposition you make will be laid before our board of directors at their regular meeting on Tuesday next.

I will advise you of the result of their consideration of your offer.

Truly yours, C. N. JORDAN, *V. P.*,
Per BRENNAN.

88 EXHIBIT No. 9. Referred to in the Deposition of C. N. Jordan. Wm. S. Mathews, N. P.

Daniel Manning, president; C. N. Jordan, vice-president; F. Blankenhorn, cashier; H. A. Smith, ass't cashier.

Capital, $3,500,000.

The Western National Bank of the City of New York.

MAY 24, 1887.

E. L. Harper, Esq., vice-pres't Fidelity National bank, Cincinnati, Ohio.

DEAR SIR: Your letter of May 16th has been submitted to our board.

We will be pleased to make the loan of $200,000 upon the sixteen hundred shares of your bank stock, payable on demand at any time after four months, five and six months being too long a time.

You will please draw the notes to your order and forward them at your convenience to this bank.

We shall be pleased to receive the account of Messrs. E. L. Harper & Co. and will discount satisfactory short-time business paper whenever we are in a position to do so.

The delay in answering your letter arose from the fact that our board meets but once a week—on Tuesdays.

Yours truly,
(S'g'd) C. N. JORDAN, *V. Pres't*,
Per BRENNAN.

89 EXHIBIT No. 10. Referred to in the Deposition of C. N. Jordan. Wm. S. Mathews, N. P.

Answered May 28, 1887.

Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cashier.

U. S. depository.

The Fidelity National bank.

Capital, $2,000,000.00; surplus, $400,000.00.

CINCINNATI, *May 26th*, 1887.

F. Blenkenhorn, Esq., cashier Western National Bank of New York City.

DEAR SIR: Your valued favor of the 24th inst. is received. In accordance therewith I hand you for discount A. P. Gahr four notes of even date of $50,000.00 each, payable on demand at any time

after four months from date, each note secured by 400 shares of the Fidelity National bank stock and endorsed by me personally. Please place the amount to the credit of Fidelity National bank, Cincinnati, Ohio. We enclose herewith signatures and have asked your bank to be approved as one of our reserve agents. I will open E. L. Harper & Co.'s account soon and trust the arrangement will be mutually satisfactory and profitable and our relations will continue a long time.

Respectfully yours, E. L. HARPER.

90 In accordance with Mr. Jordan's letter of the 24th inst. please place the full 200 M to credit. Advise me the amount of interest and I will send check.

E. L. H.

"Tag" annexed to Exhibit No. 10, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

91 Daniel Manning, president; C. N. Jordan, vice-president; F. Blankenhorn, cashier; H. A. Smith, ass't cashier.

Capital, $3,500,000.

Western National Bank of the City of New York.

MAY 28, 1887.

E. L. Harper, Esq., vice-president Fidelity Nat'l bank, Cincinnati, O.

DEAR SIR: Your favor of the 26th inst. is at hand, with enclosures, four notes of A. P. Gahr for $50,000 each and certificates for sixteen hundred shares of Fidelity Nat'l bank stock.

As requested, we have credited the account of your bank with $200,000. There is due us for interest from May 28th to Sept. 29th (124 days @ 6 %) $4,133.33, for which please remit us your check.

Yours truly,

(S'g'd) F. BLANKENHORN, *Cash'r.*

Exhibit No. 11, referred to in the deposition of C. N. Jordan, Wm. S. Matthews, N. P.

92 Copy.

NEW YORK, *May* 24, 1887.

The regular meeting of the board of directors was held at No. 11 Pine street.

There were present: Messrs. Jordan, Hartley, Tilney, C. J. Canda, Gorgorza, F. E. Canda, and Dick, Mr. Jordan occupying the chair.

The minutes of the last meeting were read and approved.

The loans and discounts since May 17th were read and approved.

Mr. Jordan reported on the question of receiving silver bullion by the Mercantile Safe Deposit Company and the registering by the company of the certificates issued by that company. After a discussion of the matter Mr. Hartley was authorized to close the con-

tract with the Mercantile Safe Deposit Company and report to the board at the next meeting.

On motion, adjourned.

F. BLANKENHORN, *Cashier.*

Exhibit No. 12, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

93 $75,000. CINCINNATI, *May* 31, 1887. No. 3100.

Fidelity National bank

Pay to the order of Wilshire, Echert & Co. seventy-five thousand dollars.

BENJ. E. HOPKINS, *A. Cas.*

To the Western National Bank of the City of New York.

Endorsed: Pay to the order of C. J. Kershaw & Co. Wilshire, Echert & Co. C. J. Kershaw & Co. Pay American Exchange Nat'l bank, New York, account of American Exchange Nat'l bank of Chicago. 1 June, 1887. A. L. Dewar, cashier. Paid (stamp of American Exchange National bank, New York, dated June 3, 1887).

Exhibit No. 13, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

94 $—. CINCINNATI, *June 2nd*, 1887. No. 3101.

Fidelity National bank

Pay to the order of National Park bank, N. Y., one hundred thousand dollars.

E. L. HARPER, *V. P.*

To the Western National Bank of the City of New York.

Endorsed: Paid (stamp of the National Park Bank of New York).

Exhibit No. 14, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

95 & 96 $—. CINCINNATI, *June* 15, 1887. No. 3102.

Fidelity National bank

Pay to the order of National Park bank, N. Y., twenty thousand dollars.

BENJ. E. HOPKINS, *A. Cas.*

To the Western National Bank of the City of New York.

Endorsed: Paid (stamp of the National Park Bank of New York).

Exhibit No. 15, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

97 Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cash.

U. S. depository.

The Fidelity National bank.

Capital, $2,000,000.00; surplus, $400,000.00.

CINCINNATI, *May* 31, 1887. 188–.

F. Blankenhors, Esq., cashier Western National bank, New York city, N. Y.

DEAR SIR: Yours of the 28th inst. received, for which please accept thanks. Enclosed herewith I hand you draft No. 15529 on Chemical National bank of your city for $4,133.33 to pay interest as requested.

Respectfully yours, E. L. HARPER.

Exhibit No. 16, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

98 $50,000.00. CINCINNATI, OHIO, *May 26th*, 1887.

On demand, at any time after four months after date, I promise to pay E. L. Harper or order fifty thousand $\frac{00}{100}$ dollars for value received, having deposited or pledged as collateral security for the payment of this note four hundred shares of Fidelity National bank stock, certificate No. 716; and I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof at any place, either in the city of Cincinnati or elsewhere, at public or private sale, at holder's option, on the non-performance of the above promise and at any time thereafter and without advertising the same or otherwise giving to me any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of such sale.

Payable at the Western National Bank of New York City.

A. P. GAHR.

[On margin of note:] Fidelity National bank.

(Endorsed:) B. D., 199. Pay the Western National Bank of the City of New York or order. E. L. Harper. 9, 29, '87. W. S. M.

Exhibit No. 17, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

99 THE UNITED STATES OF AMERICA, } ss:
State of New York, City and County of New York, }

I, William S. Mathews, a notary public in and for the State of New York, duly commissioned and sworn, do hereby certify that on the twenty-ninth day of September, A. D. 188–, at the request of the Western National bank, in New York, the original promissory note which is hereunto annexed was duly presented at the Western

National bank, in New York city, and payment thereof was then and there demanded, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest and by these presents do publicly and solemnly protest, as well against the drawers and endorsers of the said promissory note as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of the same.

Thus done and protested aforesaid in the presence of John Doe and Richard Roe, witnesses, *in testimonium veritatis.*

WM. S. MATHEWS, [SEAL.]
Notary Public.

With Exhibit No. 17, referred to in deposition of Conrad N. Jordan, Wm. S. Mathews, N. P.

(Endorsed on cover:) Protest, $50,000. For the Western National bank, New York. Sept. 29, 1887. Wm. S. Mathews, notary. Fees, $1.25.

100 $50,000.00. CINCINNATI, OHIO, *May 26th*, 1887.

On demand, at any time after four months after date, I promise to pay E. L. Harper or order fifty thousand $\frac{00}{100}$ dollars for value received, having deposited or pledged as collateral security for the payment of this note four hundred shares of Fidelity National bank stock, certificate No. 714; and I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof at any place, either in the city of Cincinnati or elsewhere, at public or private sale, at holder's option, on the non-performance of the above promise and at any time thereafter and without advertising the same or otherwise giving to me any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of such sale.

Payable at the Western National Bank of New York City.

A. P. GAHR.

[On margin of note:] Fidelity National bank.

(Endorsed:) B. D., 200. Pay the Western National Bank of the City of New York or order. E. L. Harper. 9, 29, '87. W. S. M.

Exhibit No. 18, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

101 THE UNITED STATES OF AMERICA,
State of New York, City and County of New York, } *ss.:*

I, William S. Mathews, a notary public in and for the State of New York, duly commissioned and sworn, do hereby certify that on the twenty-ninth day of September, A. D 188–, at the request of the Western National bank, in New York, the original promissory note which is hereunto annexed was duly presented at the Western

National bank, in New York city, and payment thereof was then and there demanded, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest and by these presents do publicly and solemnly protest, as well against the drawers and endorsers of the said promissory note as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of the same.

Thus done and protested aforesaid in the presence of John Doe and Richard Roe, witnesses, *in testimonium veritatis*.

WM. S. MATHEWS, [SEAL.]
Notary Public.

With Exhibit No. 18, referred to in deposition of Conrad N. Jordan, Wm. S. Mathews, N. P.

(Endorsed on cover:) Protest, $50,000. For the Western National bank, New York. Sept. 29, 1887. Wm. S. Mathews, notary. Fees, $1.25.

102 $50,000.00. CINCINNATI, OHIO, *May 26th*, 1887.

On demand, at any time after four months after date, I promise to pay E. L. Harper or order fifty thousand $\frac{00}{100}$ dollars for value received, having deposited or pledged as collateral security for the payment of this note four hundred shares of Fidelity National bank stock, certificate No. 714; and I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof at any place, either in the city of Cincinnati or elsewhere, at public or private sale, at holder's option, on the non-performance of the above promise and at any time thereafter and without advertising the same or otherwise giving to me any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of such sale.

Payable at the Western National Bank of New York City.

A. P. GAHR.

[On margin of note:] Fidelity National bank.

(Endorsed:) B. D., 201. Pay the Western National Bank of the City of New York or order. E. L. Harper. 9, 29, '87. W. S. M.

Exhibit No. 19, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

103 THE UNITED STATES OF AMERICA, }
State of New York, City and County of New York, } ss.:

I, William S. Mathews, a notary public in and for the State of New York, duly commissioned and sworn, do hereby certify that on the twenty-ninth day of September, A. D. 188–, at the request of the Western National bank, in New York, the original promissory note which is hereunto annexed was duly presented at the Western

National bank, in New York city, and payment thereof was then and there demanded, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest and by these presents do publicly and solemnly protest, as well against the drawers and endorsers of the said promissory note as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of the same.

Thus done and protested aforesaid in the presence of John Doe and Richard Roe, witnesses, *in testimonium veritatis*.

WM. S. MATHEWS, [SEAL.]
Notary Public.

With Exhibit No. 19, referred to in deposition of Conrad N. Jordan, Wm. S. Mathews, N. P.

(Endorsed on cover:) Protest, $50,000. For the Western National bank, New York. Sept. 29, 1887. Wm. S. Mathews, notary. Fees, $1.25.

104 $50,000.00. CINCINNATI, OHIO, *May 26th*, 1887.

On demand, at any time after four months after date, I promise to pay E. L. Harper or order fifty thousand $\frac{}{100}$ dollars for value received, having deposited or pledged as collateral security for the payment of this note four hundred shares of Fidelity National bank stock, certificate No. 713; and I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof at any place, either in the city of Cincinnati or elsewhere, at public or private sale, at holder's option, on the non-performance of the above promise and at any time thereafter and without advertising the same or otherwise giving to me any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of such sale.

Payable at the Western National Bank of New York City.

A. P. GAHR.

[On margin of note:] Fidelity National bank.

(Endorsed:) B. D., 202. Pay the Western National Bank of the City of New York or order. E. L. Harper. 9, 29, '87. W. S. M.

Exhibit No. 20, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

105 THE UNITED STATES OF AMERICA, }
State of New York, City and County of New York, } *ss.:*

I, William S. Mathews, a notary public in and for the State of New York, duly commissioned and sworn, do hereby certify that on the twenty-ninth day of September, A. D. 188–, at the request of the Western National bank, in New York, the original promissory note which is hereto annexed was duly presented at the Western

National bank, in New York city, and payment thereof was then and there demanded, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest and by these presents do publicly and solemnly protest, as well against the drawers and endorsers of the said promissory note as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interests already incurred and to be hereafter incurred for want of payment of the same.

Thus done and protested aforesaid in the presence of John Doe and Richard Roe, witnesses, *in testimonium veritatis*.

WM. S. MATHEWS, [SEAL.]
Notary Public.

With Exhibit No. 20, referred to in deposition of Conrad N. Jordan, Wm. S. Mathews, N. P.

(Endorsed on cover:) Protest, $50,000. For the Western National bank, New York. Sept. 29, 1887. Wm. S. Mathews, notary. Fees, $1.25.

Credit.	Offices.	Payer.	Endorser & security.	Where payable.	When due.	Rate.	No. of disc't days.	Bills disc't.	Disc'ts rec'd.	Individual ledger.
Cashier of.	W. von Sachs & Sons...	I. B. Vicini & Co. acc....	P. D. Alforseca.....	Amer. Ex. Nat. b'k, N. Y.	Aug. 25	6	89 191	1,500		
"	" ...	.....do.....40-70, good*..	.....do.....	.....do.....	" 25	"	" 192	1,500		
"	" ...	.....do.....	A. S. Garrids.....	.....do.....	" 25	"	" 193	2,000	74 17	4,925 83
Direct...	Eaton, Cole & Burnham Co.	Eaton, Cole & Burnham Co.	88,450.33, promissory notes.	Western Nat. bank.....	Oct. 1	"	126 194	7,500	157 50	
"	"	Oil Well Supply Co., Limited.	Eaton, Cole & Burnham Co.	Nat. Park bank, N. Y.	Aug. 23	"	87 195	1,831 71	26 56	
"	"	"	" 300-500, high*	"	" 25	"	89 196	1,831 71	27 17	
"	"	"	"	"	Sept. 15	"	110 197	2,085	38 22	
"	"	"	" 400 shares	"	" 30	"	125 198	2,600	43 54	15,045 43
Direct...	Fidelity Nat'l bank, Cincinnati, Ohio.	A. P. Gahr.....	E. L. Harper, Fidelity N'l B'k stock.	Western Nat. bank.....	Sept. 29	"	123 199	50,000		
"	"	"	" 400 shares "	"	"	"	" 200	50,000		
"	"	"	" 400 " "	"	"	"	" 201	50,000		
"	"	"	" 400 " "	"	"	"	" 202	50,000	(Discount to be remitted for)	200,000 00
								220,338 42	367 16	219,971 26

*In red ink.

Exhibit No. 21, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

107 *Bill Book # 1. Fidelity National Bank, Cincinnati, O.*

Date of discount.	As payer.	As endorser.	As discounter.	When due.
1887.				1887.
May 28	A. P. Gahr, 400 sh's Fidelity Nat. b'k stock	E. L. Harper	50,000	Sept. 29
	" "	" ..	50,000	" 29
	" "	" ..	50,000	" 29
	" "	" ..	50,000	" 29

Exhibit No. 22, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

108 *Discount Tickler, Sept. & Oct.*, 1887.

SEPTEMBER 29, 1887.

199.	A. P. Gahr	Transferred to time loans June 20*..	50,000†
200.	Do		50,000†
201.	Do		50,000†
202.	Do		50,000†
296.	M. Kronpeldt		2,550
302.	J. M. Hoffmann & Co., Pittsburg		193 80
502.	James Hough, Paterson		226 62
1031.	C. A. W. Crosby, Boston		492
1264.	Holt Starr & Co., Selma, Ala.		596 33

*In red ink. † Erased with red ink.

Exhibit No. 23, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

109 *Time Loans.*

No.	When made.	For whom made.	@	Amount.	When due.	When paid.	
	1887.						
7	May 28	E. L. Harper, Cincinnati, O.	6%	50,000	Sept. 29	Sept. 29	Charged to Fidelity Nat. b'k.
8	"	.....do.....		50,000	"	"	
9	"	.....do.....		50,000	"	"	
10	"	.....do.....		50,000	"	"	
		2,000 sh's Fidelity Nat. b'k.					

Exhibit No. 24, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

110 *General Credit Book, Western Nat'l B'k of City of New York, June 2*, 1887. CR.

Discount received (from Fidelity Nat'l b'k, Cin.)	4,133 33
" "	1,190 32

Exhibit No. 25, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

Date of charge.	Amount of item.	Total am't.	Date of credit.	Amount of credit.	When acknowledged.	Drawer.	Final.	Date of item.	Line No.	Payer.	Endorser.
1887.											
May 20	.....	35 60	.....	.....	.....	J. J. McDowell...	Ck....	May 1	14	Nat. La Fayette b'k, Cin., O.	Thos. J. Brennen.
21	.....	13 63	Balance *	.....	May 23*	Harry Genert	" ...	2	18	West. Germ. b'k, Cin., O.	Wertheimer & Co.
		49 23	.....	.....	.....	.....	.....	3			
June 1	Balance *	49 23	June 8*	.....	" 7*	.....	.....	4			
7	.....	77 19	" 13*	.....	" 10*	Harry May & Bro.	" ...	May 5	31	Fidelity N. B., Cin., O.	Hess Bros. & Co.
		126 42									

Ex. No. 26, referred to in the deposition of Conrad N. Jordan, Wm. S. Mathews, N. P.

* In red ink.

112 *Banker's Ledger, Fidelity National Bank, Cincinnati, Ohio.*

Amount forward from folio:			1887.				
			May 28.	D. 29th.	200,000*	200,000	
				30.	200,000*		
				31. Int. 31.	200,000*	33 33	
Bal.		200,033 33					200,033 33*
		200,033 33					200,033 33
June 3.	125,033 33*	75,000	June 1.	Balance		200,033 33	
4.	25,033 33*	100,000		1st	200,033*		
		175,000		2.	200,033*		
13.		77 19		3.	125,033*		
"	24,581 14*	375		4.	25,033*		
		175,452 19*		5.	25,033*		
17.	4,581 14*	20,000		6.	25,033*		
		195,452 19*		7.	25,033*		
				8.	25,033*		
				9.	25,033*		
				10 .	25,033*		
				11.	25,033*		
				12.	25,033*		
				13.	24,581*		
				14.	24,581*		
				15.	24,581*		
				16.	24,581*		
				17.	4,581*		
				18.	4,581*		
				19	4,581*		
Bal.		4,581 14		20.	4,581*		
		200,033 33					200,033 33
Sept. 29.	195,418 86*	200,000	July 1.	Balance		4,581 14	
30.	195,423 86*	5	Sept. 30.	Int.		8 49	
	195,415 37*	200,005*				4,589 63*	
		200,005		Bal.		195,415 37	
						200,005 00	
Oct. 1. Balance		195,415 37					

* Figures in red ink are written in pencil in original.

Exhibit No. 27, referred to in the deposition of C. N. Jordan, Wm. S. Mathews, N. P.

113 *General Ledger.*

Bills discounted.

Dr.		Cr.		
May 28, '87.	220,338 42	June 20.	Time-loan %	977,426 39
		"		906 66

Exhibit No. 28, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

114 *Discount Tickler, May & June*, 1887.

June 20.

108.	C. J. Kamper, Atlanta, Ga.	126	55
107.	E. S. Dax & Co., due 18	490	26
	Boos & Holbrook, due 21	289	85
	E. P. Wilbur, act'g trustee	25,000	
	" " due Aug. 26	25,000	
	" "	25,000	
	" "	25,000	
	Baetzer & Mayerstein, due July 9	560	
	" "	1,003	
	E. L. Harper, Sept. 29	50,000	
	" "	50,000	
	" "	50,000	
	" "	50,000	
	De Jonge & Co., due July 1	50,187	50
	31	50,416	67
	J. A. Kohn & Co., Aug. 1	50,375	
	Boetzer & Mayerstein, Aug. 4	1,176	
	W. B. Wheeler & Co., Sept. 4	101,291	67
	Rob't Crooke, Sept. 6	8,500	
	Eastman & Mandeville & Co., July 1	8,240	
	Chas. Robertson, Sept. 10	50,791	67
	Skidder, Mendford & Co., Aug. 9	42,567	
	Edward Sweet & Co., Sept. 9	101,291	67
	J. J. Habrick, Oct. 12	1,020	83
	Prince & Whibly, Sept. 5	101,222	22
	A. Lueder, " 10	45,697	50
	Moses Mehrbach, " 13	17,730	91
	Chas. Kellogg, Oct. 18	22,500	
	I. B. Vicini & Co., Sept. 16	22,848	75

Exhibit No. 29, referred to in deposition of C. N. Jordan, Wm. S. Mathews, N. P.

115 *General Debit Book, Western National Bank of New York, June* 20, 1887.

	Time loans.	Dr.
No. 1.	E. P. Wilbur, act'g trustee, estate of Asa Parker, Phila., due Aug. 26, '87	25,000
No. 2.	" "	25,000
" 3.	" "	25,000
" 4.	" "	25,000
" 5.	Beatzer & M., due 19 July, '87.	560
" 6.	" " "	1,003
" 7.	E. L. Harper, " Sept. 29	50,000
" 8.	" "	50,000
" 9.	" "	50,000
" 10.	" "	50,000

No. 11.	De Jonge & Co.,	July 1.....	50,187 50	
" 12.	"	" 31.....	50,416 67	
" 13.	J. A. Kohn & Co.,	" Aug. 1.....	50,375	
" 14.	Boetzer & M.,	" " 4.....	1,176	
" 15.	W. B. Wheeler & Co.,	" Sep. 4.....	101,291 67	
" 16.	Rob't Crooke,	" " 6.....	8,500	
" 17.	Eastman & M. Co.,	" July 1...	8,240	
" 18.	Chas. Robinson,	" Sep. 10....	50,791 67	
" 19.	Skiddy, M. & Co.,	" Aug. 9....	42,567	
" 20.	Ed. Street & Co.,	" Sep. 9.....	101,291 67	
" 21.	J. J. Habrich,	" Oct. 12, '87.	1,020 83	
" 22.	Prince & W.,	" Sep. 5, " .	101,222 22	
" 23.	A. Lueder,	" " 10, " .	45,697 50	
" 24.	M. Mehrbach,	" " 13, " .	17,730 91	
" 25.	Chas. Kellogg,	" Oct. 18, " .	22,500	
" 26.	J. B. Vicini & Co.,	" Sept. 16...	22,848 75	
				977,420 59

Exhibit No. 30, referred to in deposition of C. N. Jordan. Wm. S. Mathews, N. P.

116 Daniel Manning, president; C. N. Jordan, vice-president; F. Blankenhorn, cashier; H. A. Smith, cashier.

Capital, $3,500.

The Western National Bank of the City of New York.

JUNE 9, 1887.

E. L. Harper, Esq., vice-president Fidelity National Bank, Cincinnati, O.

DEAR SIR: Referring to your letter of the 16th ult., wherein you make a proposition that we shall "take a loan of $200,000, secured by 1,600 shares of our (your) bank stock, due $50,000 each 3, 4, 5, and 6 months, and place proceeds to the credit of this (your) bank, and the bank to designate you (us) as one of their reserve agents and keep part of their New York account with you (us) under your (our) proposition of the 6th inst.," and wherein you say further, "our balance will no doubt average more than $200,000," I have to say that we accepted your proposition with the idea and under the impression that the $200,000 therein asked for was to be retained by this bank on deposit as your reserve agent. If this had not been our understanding of the case, derived from your letter, we should not have made the loan, and we think that one of two things
117 ought now to be done—either the balance should be restored to the amount of $200,000 or we rebate the loan and you pay it. We are not content to make advances upon bank stock in Cincinnati, as we have had and have now a full demand for all our moneys.

I beg that you will give this matter your immediate attention, for as it now stands it falsifies the representations made by me in

presenting the loan to our board, and I desire to see it corrected at the earliest possible moment.

Very respectfully yours,

(S'g'd) C. N. JORDAN, *V. P.*

Exhibit No. 31, referred to in the deposition of C. N. Jordan. Wm. S. Mathews, N. P.

118 THE WESTERN NATIONAL BANK,
NEW YORK, *May* 28, 1887.

Charge. *Bills Discounted.*

For whose credit.	Amounts.
Cashier's ac. W. Von Sachs & Sons	4,925 83
Eaton, Cole & Burnham & Co.	15,045 43
Fidelity Nat. bank, Cincinnati, O.	200,000
Discount received.	367 16
Exchange account	
Total	220,338 42

Exhibit No. 32, referred to in the deposition of C. N. Jordan. Wm. S. Mathews, N. P.

119 Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benj. E. Hopkins, ass't cashier.

U. S. depository.

The Fidelity National bank.

Capital, $2,000,000.00; surplus, $400,000.00.

CINCINNATI, *June 13th*, 1887.

C. N. Jordan, V. P. the Western National bank, New York city, N. Y.

DEAR SIR: Yours of the 9th inst. is at hand and carefully considered. I cannot understand how you could construe from my letter of the 16th ultimo that the $200,000.00 should remain with you. I stated that the Fidelity National bank balance would no doubt average more than $200,000.00, and this you will find will be made good. The Fidelity National bank has had your bank designated as one of their reserve agents and they are now getting drafts engraved, and everything will be ready to start in with you actively

about July 1st; and you will find the account a valuable one and everything will work to your entire satisfaction.

Respectfully yours, E. L. HARPER.

Exhibit No. 33, referred to in the deposition of C. N. Jordan. Wm. S. Mathews, N. P.

120 And afterwards, to wit, on the 7th day of April, A. D. 1890, the following deposition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

STATE OF OHIO, *Hamilton County,* } ss:

WESTERN NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, Receiver. } Case No. 4204.

Pending in the circuit court of the United States for the southern district of Ohio, western division.

The above-named complainant will take notice that on Friday, the 4th day of April, A. D. 1890, the defendant above named will take the depositions of —— witnesses, to be used as evidence in the trial of the above cause, at the office of David Armstrong, receiver, in the city of Cincinnati, in the county of ——, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the takin- of the same will be adjourned from day to day, between the same hours, until they are completed.

JOHN W. HERRON,
Att'y for Def't.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this 2nd day of April, 1890.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Att'ys for Complainant.

121 THE WESTERN NATIONAL BANK OF NEW YORK, Complainant,
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Respondent.

Office of David Armstrong, receiver of the Fidelity National bank, at Cincinnati, O.

FRIDAY, *April 4th*, 1890—three o'clock p. m.

Depositions of J. Harry Watters, H. C. Yergason, and J. D. Hearne, taken before me, William C. Herron, a notary public in and for the county of Hamilton, State of Ohio, taken pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of the respondent in an action pending in the United States circuit court for the southern district of Ohio, western division, in which The Western National Bank of New York City, New York, is complainant, and David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, is respondent, Hon. Judson Harmon being present for complainant and Hon. John W. Herron being present for respondent.

122 J. HARRY WATTERS, being first duly sworn, deposes and says as follows:

Direct examination by Mr. HERRON:

Q. State your name, age, residence, and occupation, and what connection, if any, you had with the Fidelity National bank in Cincinnati.

A. J. Harry Watters; age, 29; residence, Avondale, Cincinnati, a suburb of Cincinnati. I was general book-keeper in the Fidelity National bank from March 1st, 1886, to June 20th, 1887.

Q. As such book-keeper, what connection had you, if any, with the accounts between said Fidelity National bank and other banks doing business with said Fidelity National bank.

A. I kept all the accounts—that is, the bank accounts—that the Fidelity did business with.

Q. Mr. Watters, will you produce the account between the Fidelity National bank and the Western National Bank of New York City, as it appeared on the books of the Fidelity Nat'l bank, and attach a copy of it to your answer?

A. Yes, sir. I produce book in which said account was kept; it is on p. 788 of the account current, National Bank Ledger No. 2, and I will attach a copy of the account to my answer.

Q. State whether the Fidelity National bank received any proceeds from the Western National Bank of New York of four notes of A. P. Gahr of fifty thousand ($50,000) dollars each, or of a loan of two hundred thousand ($200,000) dollars claimed to be made by said Western National Bank of New York City to the Fidelity National bank.

123 A. There appears no record on the books of the Fidelity National bank of the Fidelity ever getting any proceeds or any moneys from the Western National bank other than what is shown in the account, a copy of which I have attached hereto.

Q. State what knowledge you had before the failure of the Fidelity National bank of three drafts drawn on the Western National Bank of New York City by the Fidelity National bank—one for $75,000.00, one for $100,000.00, and one for $20,000.00.

A. I had no knowledge whatever.

Q. Did such drafts appear on the books of the Fidelity National bank?

A. No, sir; they did not.

Q. State whether, at any time, you saw an account current rendered by the Western National bank showing any such proceeds as credited to the Fidelity National bank; and, if so, what you did about that.

A. In the first part of June, 1887, there was placed on my desk by one of the clerks an account current from the Western National Bank of New York. To the best of my recollection, there appeared to the credit of the Fidelity National bank, on this account current, two hundred thousand ($200,000.00) dollars. As I had no account on the books of the Fidelity National bank with the Western National Bank of New York at that time, I took the account current to Mr. E. L. Harper and gave it to him, he making the remark to me at the time he received it, "Oh, that is some private matter of my own."

124 Counsel for complainant objects to what was said by Mr. E. L. Harper and moves to strike same from the answer.

Q. State what became of the account current after you handed it to Mr. Harper.

A. I cannot say.

Q. Did you ever see it afterwards?

A. No, sir.

Q. Look at the endorsements on the back of the four notes of A. P. Gahr, now shown you, and state in whose handwriting the words "Pay Western National Bank of the City of New York or order" are.

A. In the handwriting of Miss Josie Holmes.

Q. In whose handwriting is the filling—the body of the notes?

A. Miss Josie Holmes.

Q. State whether you have ever seen the original drafts for $75,000.00, $100,000.00, and $20,000.00, about which I have asked you; and, if so, state in whose handwriting those drafts were filled.

A. Yes, sir; I have seen the originals, and they are in the handwriting of Miss Josie Holmes.

Q. What connection had Miss Holmes with the Fidelity National bank?

A. She was the exchange clerk—that is, she drew the drafts on foreign banks.

Q. State what experience and how long an experience you have had in the banking business.

A. Since October, 1879.

Q. State whether or not it is an unusual circumstance in banking, among banks, for money to be deposited in or forwarded
125 to a bank by one person with directions to credit it to another.

Counsel for complainant objects to the foregoing question as incompetent and leading.

A. Yes, sir; it is a common occurrence.

Cross-examination by Judge HARMON:

Q. What position in the Fidelity National bank was held by Mr. E. L. Harper, to whom you have referred.

A. E. L. Harper was the vice-president and managing officer.

Q. By "managing officer" do you mean that he was the general manager of the business of the bank?

A. Yes, sir.

Q. The president, Mr. Briggs Swift, did not actively participate in the management of the bank?

A. He was at the bank 2 or 3 hours every day when he was in the city of Cincinnati.

Q. Whether he actually participated in the management of the bank?

A. To some extent he did—not very much.

Q. What position in said bank was held by Mr. Benjamin E. Hopkins?

A. Ass't cashier.

Q. Did Mr. Hopkins and Mr. Harper hold the position you have named during the same period that you were connected with the said bank?

A. Yes, sir.

Q. Have you ever seen the original drafts referred to by you in your examination-in-chief, drawn by the Fidelity National bank on the Western National bank?

A. Yes, sir.

Q. Do you know where the same are now?

A. No, sir.

Q. In what form were said drafts, as to being on printed blanks; and, if so, what kind?

126 A. It was on a form similar to the ones used by the Fidelity on other correspondents on whom they had drawn for money; a fac-simile of the draft I attach to my deposition.

Q. The drafts were drawn on printed drafts like the copy which you now produce?

A. Yes, sir.

Q. State by whom said drafts were signed.

A. Draft No. 3101, for $100,000.00, was signed by E. L. Harper, V. P.; draft No. 3100, for $75,000.00, and draft No. 3102, for $20,000.00, were signed by Benjamin E. Hopkins, ass't cashier.

Q. You are familiar with the handwriting of Messrs. Hopkins and Harper, are you?

A. Yes, sir.

Q. Were those drafts signed by them, in their handwriting?

A. Yes, sir.

The original drafts having been mislaid, it is agreed between counsel that copies may be used in their stead.

Q. What was the time when you saw the account current from the Western National bank to which you have referred?

A. The 1st, 2nd, 3rd, or 4th day of June, 1887.

Q. It is usual for banks to send such accounts on the first of each month?

A. Yes, sir.

Q. And it was in the usual time of transmission by mail, after June 1st, that you saw this account current?

A. Yes, sir.

Q. What was the date of the failure of the Fidelity National bank?

127 A. June 21, 1887.

Q. These notes were all signed by A. P. Gahr?

A. Yes, sir.

Q. Who was A. P. Gahr, the signer of the notes to which your attention has been called?

A. One of the directors of the Fidelity National bank.

Q. What was his official standing?

A. He had none whatever that I know of.

Q. What was his relationship to E. L. Harper?

A. He was an employee in the corporation of the Swift's iron and steel works, of which E. L. Harper was the president or the vice-president—I don't remember which; anyway, he was in the employ of E. L. Harper.

Q. Was he a director of the Fidelity National bank during the entire period you have named?

A. Yes, sir.

Q. Had he an account in the Fidelity bank?

A. Yes, sir.

Q. And had E. L. Harper such a private account?

A. Yes, sir.

Q. Does the two-hundred-thousand note in question, or any part of the same, appear in either of said accounts?

A. No, sir.

128 Redirect examination.

Mr. HERRON:

Q. State whether the draft register of the Fidelity National bank shows any drafts to have been issued of the number 3100, 3101, or 3102.

A. Do you mean at any time?

Q. Yes.

A. There are similar numbers on the Chemical National Bank of New York City.

Q. When were those drafts drawn?

A. In July, 1886. There was also the same numbers for the National Broadway bank, which occurs in June, 1886. There was always a separate set of numbers for each bank on which drafts were drawn.

Q. What other business was A. P. Gahr engaged in in addition to being a director of the Fidelity National bank?

A. He was an employ- of Swift's iron and steel works.

Q. Do any drafts appear on the draft register at all drawn on the Western National Bank of New York City?

A. No, sir; nonw whatever.

Q. Do the books show any business transaction of any kind with the Western National Bank of New York other than those entered on the account current referred to in your answer?

A. No, sir.

129 Recross-examination.

Judge HARMON:

Q. Was it the custom of the Fidelity National bank to print drafts with the name of the drawee, as was done in the case of the Western National Bank of New York, unless it was a regular correspondent having an account calling for such drafts?

A. It was not.

Q. Do you know when those drafts, a fac-simile of which you have produced and attached to your deposition, were so printed?

A. No, sir.

Mr. HERRON:

Q. When did you first see them?

A. After the failure.

Judge HARMON:

Q. I understand that in printing such drafts that the custom was to have the numbers consecutive, counting all the banks together, so that No. 3196 on the copy which you have produced would not indicate a number of drafts to that amount drawn on the Western National Bank of New York alone?

A. There was set apart for each set of outside drafts about one hundred numbers. On the Chemical National Bank of New York and on the Nat'l Broadway bank, the regular New York correspondents of the Fidelity National bank, drafts were drawn on these banks and numbered consecutively, and also printed the name of the respective bank on which the draft was drawn, while with outside banks—that is, other banks then these—a space was left to write the name of the bank on which the draft was drawn and

130 numbers were printed or a space left and filled in.

Q. The two banks you have named, on which the names

of the drawees were printed, were reserve agents of the Fidelity bank?

A. Yes, sir.

Q. And said drafts were prepared in no other cases?

A. None that I can recall to mind at the present time.

Re-redirect examination.

Mr. HERRON:

Q. I understand that you knew nothing about these drafts until after the failure of the Fidelity National bank?

A. Yes, sir; that's right. They were then found in Miss Josie Holmes' drawer.

Re-recross-examination.

Judge HARMON:

Q. You had nothing to do with the preparation or issuing of drafts, had you, your position being that of book-keeper?

A. No, sir; I had nothing to do with the preparation or issuing of drafts.

J. HARRY WATTERS.

O. K. J. W. S. C.

131 *Western National Bank, New York City, in Account with the Fidelity National Bank, Cincinnati, Ohio.*

1887.		1887.	
June 6	$49 23	May 23	$49 23
		June 9	77 19
Balance	452 19	10	375
	501 42		501 42

Copy.

132 Fidelity National Bank.

$—. CINCINNATI, —— —, 188–. No. 3196.

Pay to the order of —— —— dollars.

—— ——, *Cashier.*

To the Western National Bank of the City of New York.

133 H. C. YERGASON, called on behalf of defendant, being first duly sworn, testifies as follows:

Direct examination.

Mr. HERRON:

Q. State your name, residence, and occupation.

A. H. C. Yergason; residence, Cincinnati; vice-president of the Merchants' National Bank of this city.

Q. How long have you held that position, and what experience have you had in banking business, and where?

A. I had nine years' experience in Hartford, Conn., and twenty-four years in the Merchants' National Bank of Cincinnati, 8 years of which I have been vice-president and 16 years cashier.

Q. State whether or not it is customary in the banking business for one person to remit to a bank or to deposit in a bank money for the credit of some one else.

A. Occasionally we have requests from one party, person, or bank to place funds to the credit of another person or bank, either in this city or elsewhere.

Q. State whether or not in such cases there is any indebtedness incurred to your bank by the person to whose credit it is ordered to be deposited.

A. If I can illustrate this by supposing the National Bank of America of Chicago should request us to place an amount in another bank in this city for the credit of some third party, I don't see any obligation on our part.

Q. Any obligation to your bank from that third party?

134 A. No, sir.

Q. State whether the proceeds of discounts are or not sometimes directed to be placed to the credit of some other person or bank.

A. Proceeds of paper discounted by us are occasionally placed to the credit of banks or individuals, as directed by the party offering same.

Q. State whether or not any obligation from the party to whose credit they are deposited arise towards you—to your bank.

A. I judge not; I cannot understand why any obligation should arise from the party to whose credit the money is placed.

Complainant's counsel objects to each and all the foregoing questions, except the first two, as incompetent and leading; and to each and all the answers thereto as irrelavant and incompetent.

135 No cross-examination.

J. D. HEARNE, called on behalf of defendant, being first duly sworn, testifies as follows:

Direct examination.

Mr. HERRON:

Q. State your name, residence, and occupation.

A. J. D. Hearne; residence, Covington; president of the Third National Bank of this city.

Q. State what experience you have had in bank matters, Mr. Hearne.

A. About 20 years.

Q. State what custom, if any, exists among the bankers as to placing, depositing, or receiving remittances for the credit of persons other than the one depositing the money.

A. Such a thing is very usual; it is done almost daily.

Q. State the course.

A. We receive the money from the person depositing it and place it to the credit of the party to whose credit he requests us to place it, and we give him a certificate to that effect—a certifying that it has been done—and this certificate is issued in duplicate, which we mail to the party to whose credit the money is placed.

Q. State whether your bank has blank certificates prepared for business of that kind; and, if so, will you attach one to your deposition?

A. Yes, sir; we have blanks of that kind, and I now hold in my hand such a blank, one of which is the original, the other is the duplicate; I produce it, to be attached to my deposition.

136 Q. State whether any liability arises from that transaction, in the case of money being deposited, from the person to whose credit the money is deposited.

A. We are liable to the party——

Q. No, that is your liability; I want you to state whether any liability arised from the party to whose credit the money is placed.

A. If the person depositing it stated that it is for the credit of a certain bank named, for the use of himself, we so state it in the certificate that we give him. In that case the bank to whose credit it is placed becomes the payer to the person who deposits the money; in other words, it is simply a transfer of funds by the person making the deposit with us to the other bank to save him the risk and trouble of transporting the money from one place to the other.

Complainant's counsel objects to each and all the foregoing questions, except the first two, as incompetent and leading, and to each and all the answers thereto as irrelevant and incompetent.

137 Cross-examination.

Judge HARMON:

Q. By the general usage or custom among banks in this city, during the time you have been a banker, if there has been such, state whether it has been within the authority of the managing officer of a bank to borrow money for it from other banks.

A. I do not know that there was any specific law governing the case, but it has been the custom to do so if the emergencies seem to require it.

Q. That is to say, it has been the custom that the managing officer of a bank has had authority to borrow money from other banks?

A. Yes; and to loan to other banks.

Signature to the foregoing depositions waived by counsel.

(See J. D. Hearne's exhibit, marked p. 137½.)

138 STATE OF OHIO, } ss:
Hamilton County, }

I, William C. Herron, a notary public in and for the county of Hamilton, Ohio, do hereby certify that J. Harry Watters, H. C. Yergason, and J. D. Hearne were by me first severally sworn to testify the truth, the whole and nothing but the truth, and that the depositions by them respectively subscribed, as above set forth, were reduced to writing by E. V. Ryan, who is not interested in the suit, in my presence and in the presence of the witnesses respectively, and were taken at the time and place in the annexed notice specified, and were continued from day to day as above set forth; that I am not counsel, attorney, nor relative of either party, nor otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 7th day of April, A. D. 1890.

WILLIAM C. HERRON,
Notary Public in and for Hamilton County, Ohio. [SEAL.]

David Armstrong, rec., to William C. Herron, Dr.

To services as notary $5 00
" " of stenographer .....

Rec'd payment. W. C. HERRON,
Notary Public.

139 And afterwards, to wit, on the 8th day of April, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Z, p. 16.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE WESTERN NATIONAL BANK OF NEW YORK, Complainant. }
vs.
DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Defendant. }

This day this cause came on to be further heard and was argued by counsel, and, the court being fully advised, it is ordered, adjudged, and decreed that the bill of complaint of the said The Western National Bank be, and the same hereby is, dismissed at the costs of the complainant and execution is awarded therefor; and thereupon came the complainant and in open court prayed an appeal to the Supreme Court of the United States; which appeal is allowed upon the complainant executing a bond for costs in the sum of five hundred dollars, to be approved according to law.

140 And afterwards, to wit, on the 18th day of July, A. D. 1890, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

THE WESTERN NATIONAL BANK OF NEW YORK
vs.
DAVID ARMSTRONG, as Receiver of the Fidelity National Bank.

Know all men by these presents that we, The Western National Bank of New York and John F. Winslow, are held and firmly bound unto David Armstrong, as receiver of the Fidelity National bank, in the sum of five hundred dollars, to be paid to the said David Armstrong, receiver of the Fidelity National bank, his successors, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 18th day of July, 1890.

Whereas the above-named The Western National Bank of New York has prayed an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled
141 action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The Western National Bank of New York shall prosecute its said appeal to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE WESTERN NATIONAL BANK
OF NEW YORK,
By GEO. HOADLY, *Its Attorney.* [SEAL.]
J. F. WINSLOW. [SEAL.]

Sealed and delivered in presence of—
A. W. GOLDSMITH.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. Ohio.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, J. F. Winslow, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth two thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

J. F. WINSLOW.

Sworn to before me this 18th day of July, 1890.
[SEAL.] DAVID F. KRONACHER,
Notary Public, Hamilton County, Ohio.

142 UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record and on file in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 31st day of July, A. D. 1890.

Seal of the Circuit Court, South'n Dist. of Ohio.

B. R. COWEN, *Clerk.*
JANIE W. COWEN, *Deputy.*

Endersed on cover: Case No. 14,266. S. Ohio C. C. U. S. No. 251. The Western National Bank of New York, appellant, *vs.* David Armstrong, receiver of the Fidelity National bank. Filed October 13, 1890.

Office Supreme Court U. S.
FILED,
JAN 20 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 251.

The Western National Bank of New York,
Appellant.

vs.

David Armstrong, Receiver of the Fidelity National Bank,
Appellee.

BRIEF FOR APPELLANT.

JUDSON HARMON,
EDWARD COLSTON,
GEO. HOADLY, JR.,
Counsel for Appellant.

PRESS OF THE OHIO VALLEY CO., CINCINNATI.

ASSIGNMENT OF ERRORS.

The errors relied upon are:

1. Dismissal of the bill of complaint.

2. Sustaining a demurrer of defendant to a portion of the bill.

3. The decision of the court below that the loan was not made to the Fidelity National Bank, but to Harper individually.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 251.

The Western National Bank of New York,
Appellant.

vs.

David Armstrong, Receiver of the Fidelity National Bank,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT.

Appellant sued to compel the allowance of its claim against the funds of the Fidelity Bank in the hands of appellee for distribution.

Appellant's claim was for $195,415.37, being the amount paid by it to the Fidelity Bank on drafts drawn by the latter against a fund of $200,000, which appellant, at its request, had placed to its credit on appellant's books.

It is not disputed that appellant did place $200,000 to the credit of the Fidelity Bank on appellant's books, nor that the above amount was drawn therefrom on drafts thereon

by the proper officers of the Fidelity Bank; but appellee denies that the money was so placed to the account of that bank on its credit or at its request, and avers that the amount thereof so paid out by appellant, though paid on drafts drawn in the name of the Fidelity Bank, by the officers in charge of its business with authority to draw drafts, did not in fact come into its possession or go to its use.

What actually took place is not in dispute, so that the only question is concerning its effect.

We shall therefore state the transaction as disclosed by the record, claiming it shows:

First. The $200,000 was placed to the account of the Fidelity Bank at its request, on its credit, and for its accommodation.

Second. The Fidelity Bank drew out the sums drawn and was chargeable therewith, whatever was done with them by its officers.

Third. That the court below erred in sustaining a demurrer to certain parts of the bill.

I.

THE CREDIT OF $200,000.

The transaction was conducted entirely by correspondence between E. L. Harper, who was the Vice-President and General Manager of the Fidelity Bank, with complete authority and control, the President being a mere figure-head (Rec. p. 68), and Conrad N. Jordan, who occupied the same position with appellant.

There had been some correspondence about the terms on which the two banks would make collections for each other (Rec. pp. 46–47). On May 6, 1887, appellant wrote: "We would be pleased to receive your New York account, etc." May 16th (Rec. p. 48, exhibit 6), Harper wrote the

following under the regular official letter-head of the Fidelity bank:

U. S. DEPOSITORY.

THE FIDELITY NATIONAL BANK.

CAPITAL, $2,000,000.00; SURPLUS, $400,000.00.

BRIGGS, SWIFT, PRESIDENT. AMMI BALDWIN, CASHIER.
E. L. HARPER, VICE-PRESIDENT. BENJAMIN E HOPKINS, ASS'T CASHIER.

CINCINNATI, MAY 16, 1887.

Western National Bank of New York City.

GENTLEMEN:—Your letters of the 6th–13th to hand. We are pleased to know you will send us your items for the present, under our propositions of April 28th and May 10th, and we will give your business our best attention.

At what rate will you take a loan of $200,000, secured by 1,600 shares of our bank stock, due $50,000 each 3, 4, 5 and 6 months, and place proceeds to the credit of this bank, and the bank to designate you as one of their reserve agents, and keep part of their New York account with you under your proposition of the 6th inst.? I will endorse the collateral notes, and I am worth over $2,000,000 net. We have just doubled our capital stock, all paid in, and paid in $400,000 surplus, and this loan will give some of our principal stockholders time to turn. 155 is to-day bid and 160 asked for our stock. Our balance will no doubt average more than $200,000. I can also, if you desire, give you my firm account, Messrs. E. L Harper & Co., and send you some choice business paper from time to time.

While Mr. Swift and myself are only small stockholders with you, we desire to give you all the business we can.

Your early reply will oblige,

Respectfully yours,

E. L. HARPER.

Harper's signature to this letter is not followed by the letters V. P., but this is not important if it appears that he wrote the letter as an officer of the bank and on its behalf. In *Xenia Bank* v. *Stewart*, 114 U. S. 224, the question concerned a similar letter, signed by a cashier without adding anything to his signature to indicate that it was official. This court said, p. 230:

"The letter was written upon the paper of the bank, and by the person shown to be its cashier, and it appears with reasonable certainty to have referred to the business of the bank. The court was therefore right in not excluding it from the jury."

The first clause of the letter now in question was unquestionably about the business of the Fidelity Bank. The second requests a loan to be secured by stock of the bank, and to be placed "*to the credit of this bank*," which is to "designate you as one of their reserve agents and keep part of their New York account with you, under your proposition of the 6th inst." Here we find, in the same sentence with the request for the loan, three proposals in connection with it all of which related beyond dispute to the business of the bank, viz.: the placing of the amount to its credit, the designation of appellant as reserve agent, and the acceptance of the previous proposal as to the keeping of the New York account. *Noscitur a sociis*. The letter does not expressly name the proposed borrower, but any one reading it would understand that the request for the loan was made by Harper, as an officer of the bank, and for the bank. He undoubtedly intended to be so understood. He was so understood. Blankenhorn answered, May 18, that Mr. Jordan was away, but would return next day (Rec., p. 49, exhibit 7). Although

this letter appears to have been marked "personal," it was directed to Harper officially, and related to the entire letter of which it was an acknowledgment. But as Blankenhorn expressly disclaimed acting on the proposal, referring it to Jordan on his return, this letter is of no importance even though we should concede all that may be claimed as to the writer's use of the word "personal."

Jordan, who alone acted for appellant in the matter, replied on his return, May 20, addressing Harper officially (Rec., p. 49, exhibit 8), saying his proposal would be laid before the board at their next meeting. He understood the proposal to be made on behalf of the Fidelity Bank, and so presented it to the board.

"I read the letter of Mr. Harper to the board; presented it to them as an application on the part of the Fidelity National Bank for a loan." (Rec., bot. of p. 20.)

"Q. 29. Was there any proposition made at that meeting in regard to a loan of E. L. Harper?

A. No, sir.

Q. 30. Did you understand these letters at the time of their receipt as applying for a loan on behalf of E. L. Harper?

A. No, sir.

Q. 31. In whose behalf did you understand the loan to be applied for?

A. The Fidelity National Bank." (Rec., p. 21.)

While these questions and answers were objected to when the deposition of Mr. Jordan was taken, the objections were not insisted on at the trial, and no ruling was asked or made thereon.

Chas. J. Canda also testified:

"A. Mr. Jordan presented an application for a loan from the Fidelity Bank for $200,000, and read a letter which he had received in connection with it.

Q. 5. Is this letter of May 16 the letter which was read at that time?

A. Yes, sir; this is doubtless the letter (Ex. No. 6).

Q. 6. Was the loan approved by the board?

A. It was; he was authorized to make the loan to the bank.

Q. 7. To whom?

A. To the Fidelity National Bank.

Q. 8. Was there any consideration at that time of any loan to E. L. Harper?

A. No; there had never been any business done with E. L. Harper." (Rec., p. 35.)

The minutes of the board (Rec., bot. p. 51, exhibit 11), merely show the reading and approval of loans and discounts presented, but the foregoing testimony shows that this loan was approved as presented by Jordan, viz., as a loan to the Fidelity Bank. The date of the meeting was May 24th, which was before the proposal was accepted, and of course before the notes were sent us. The same day, May 24, Jordan wrote, addressing Harper officially, accepting the proposal of May 16th with a modification as to the time of the loan. (Rec., p. 50, exhibit 9.)

" DANIEL MANNING, President. F. BLANKENHORN, Cashier. C. N. JORDAN, Vice-President. H. A. SMITH, Ass't Cashier.

CAPITAL, $3,500,000.

THE WESTERN NATIONAL BANK OF THE CITY OF NEW YORK.

MAY 24, 1887.

E. L. HARPER, ESQ., *Vice-Prest. Fidelity National Bank, Cincinnati, Ohio:*

DEAR SIR—Your letter of May 16th has been submitted to our board.

We will be pleased to make the loan of $200,000 upon the sixteen hundred shares of your bank stock, payable on demand at any time after four months, five and six months being too long a time.

You will please draw the notes to your order and forward them at your convenience to this bank.

We shall be pleased to receive the account of Messrs. E. L. Harper & Co., and will discount satisfactory short-time business paper whenever we are in a position to do so.

The delay in answering your letter arose from the fact that our board meets but once a week—on Tuesdays.

Yours truly,

C. N. JORDAN, *V. Pres't*,
Per BRENNAN."

It will be noticed that down to this time not a word had been said by either party as to whose notes were to be given to evidence the loan. Harper referred to "the collateral notes" in his letter of May 16th making the original proposal and offered to endorse them, showing that both parties understood that notes were to be given by somebody, but merely to put the loan in bankable form. When we consider that two bank officers were writing to each other, and that both understood that, to conform with well-known bank usages, there must be commercial paper and security as well, this reference to "collateral notes," to the character of the endorser, and to the sufficiency of the stock to be pledged as security, is readily understood. If the Fidelity Bank itself were to sign the notes it would be inconsistent with banking rules not to have security therefor. And Harper's offering his own endorsement, although the stock offered in pledge was more than ample at its then market price, shows that the parties understood that the stock of the bank, while it provided a tangible security, really added nothing to the obligation of the bank itself, which necessarily outranked its own stock.

So Harper's offering himself as endorser only shows, even without the statement that the loan was to be placed to the credit of the bank, that he did not propose himself as the borrower, but some one else. Consider that some one else to be the bank, whose officer he was, on whose official paper he was writing, and to whose benefit alone the proceeds of the loan were to go, and the failure of Harper to state and of Jordan to ask who the maker of the collateral notes was to be, is clearly explained. Consider that some one else—the real borrower—to be other than the Fidelity Bank, and Harper's failure to state and Jordan's to ask is unexplainable.

It is plain that both parties understood that the notes were to be a mere form—the putting into commercial shape, for the application of bank routine thereto, of an obligation between two banks, whereby one accommodated the other with a short loan. Therefore it was entirely immaterial whether John Doe or Richard Roe gave the notes. Whoever Harper might get to lend his name for the convenience of his bank in the transaction could look to the bank which was to get the money to protect him, by paying the notes when they should fall due; and Harper, who lent his own name as endorser, had the same right.

Harper styled the notes to be given "collateral notes," an expression which shows that these notes were merely banking formalities.

So when, May 26 (Rec. p. 50, exhibit 10), Harper, again writing on the official paper of his bank, sent on the notes of A. P. Gahr, with his own endorsement and the stock, saying, "Please place the amount to the credit of Fidelity National Bank," appellant made no enquiry about Gahr's ability to pay. He was one of the directors of the Fidelity Bank, but had no means. "Official" is a misprint for "financial" in the question put to J. H. Watters (middle of p. 69 Rec.)

"Q. What was his (Gahr's) official standing?

A. He had none whatever that I knew of."

Nothing had been said by Harper in his first letter of May 16th about discounting these "collateral notes." On the contrary, he had spoken of the transaction as "making a loan," and Jordan in accepting the proposal on May 24th had done the same. That the transaction was the making of a loan, with these notes and the stock as collateral, is shown by the fact that the entire $200,000 was placed to the credit of the Fidelity Bank, and the interest paid by draft on the Chemical National Bank of New York (Rec. p. 53, exhibit 15). This draft was that of the Fidelity Bank and was credited to it (see bottom p. 59, exhibit 24), which further confirms the claim that it was the real borrower.

Of course the notes were regularly entered on the appellant's books among the regular discounts, but that was a mere matter of book-keeping, the mere carrying out of the idea which ran through the entire transaction.

We submit that we have given the true construction of the letter of May 16th requesting the loan. The request was not made for the discount of existing paper or of paper to be made. It was for *a loan*. A loan can not be made unless there be a borrower. Harper offered himself as endorser only. The money was for the bank as expressly stated. The necessary conclusion is that it was the borrower. The position of appellee's counsel below, which he succeeded in leading the court to adopt, was that while the money was borrowed for the bank, it was not borrowed by the bank, but by Harper individually. This seems to us an extraordinary claim in view of the evidence above given. If Harper meant to borrow the money himself he would have said so in express terms, because he would be proposing something unusual. As

the money was to go to his bank, Harper, writing for the bank on its official paper concerning its business, would naturally assume that it would be understood that he was asking the loan for the bank and so neglect to say so expressly. What is naturally understood is more apt not to be expressed that what is unusual. No good reason is or can be assigned why Harper should not have asked a loan to himself if that was what he meant. The reason we have given is sufficient to explain why he did not in express terms ask the loan for the bank.

We do not deny that one may borrow money and direct it to be placed to the credit of another, nor do we deny that merely placing it to the credit of that other, would not, in such a case, make that other liable to the lender. But such a transaction is not to be expected unless some reason appear for it. It is so much out of the usual course of things that it will not be presumed but must clearly appear. When the person negotiating the loan is the agent of the one receiving the money, with no apparent obligation or motive for transferring his own money to his principal, and when, too, every circumstance indicates that he is acting for his principal, the assumption that the transaction was such unusual one is very violent.

On the contrary, the mere fact that the note of another is for any reason given to evidence a loan will not absolve the real borrower from liability. His liability is for money had and received. It is entirely independent of the note given by the other person.

See *Marston* v. *Boynton*, 6 Met. 127:

The action was assumpsit for money lent against the person who received the money. The note of a third person, however, had been given to the plaintiff, and this fact was relied upon as a defense. The court charged the jury (p. 128),

"That the acceptance of Centre's note by the plaintiff, for the amount lent, raised a presumption that the credit was given to Centre, but that this fact was not conclusive; that the jury would look at all the circumstances of the transaction, and if they were satisfied that the parties, at the time, understood that the loan was made to the defendants, and upon their credit, they (the jury) should return a verdict for the plaintiff; otherwise, for the defendants."

The court said through Shaw, C. J.:

"The court are of opinion that the directions of the court of common pleas were right. The court instructed the jury first to inquire whether the loan was made by the plaintiff to the defendants, on their credit; and there was evidence to warrant the jury in finding that it was so made. If it was, then, by operation of law, the defendants became bound to repay the money, and the note of Centre, received of them by the plaintiff, *was merely collateral security.*"

Also, at p. 130:

"But if the credit was given to them (defendants), then they were liable, not on their conditional promise only, but on *their implied legal obligation*, as debtors, to repay the amount lent to them. This was the question left to the jury; and the court instructed them that the acceptance of Centre's note raised a presumption that the credit was given to him, and not to the defendants; but that it was a presumption of fact, which might be rebutted by other evidence, and it was left to them on the whole evidence." (Italics ours.)

It is always a question of fact, who was the real borrower.

But suppose Harper merely used the paper of the bank in asking the loan, artfully putting the request in connection with what was clearly bank business and stating that it was to be placed to the credit of the bank in order to create an impression that it was his bank which wanted to borrow the

money. Does this help the case of appellee? The correspondence plainly shows that appellant was deceived, if deception were intended. In addition to the evidence above quoted, see Jordan's evidence (Rec., p. 23).

"Q. 59. What was your understanding of the purposes of the Fidelity Bank in making this loan?

A. I understood that it was intended to keep a reserve with us as one of its reserve agents, and that it was not to be drawn upon. I so stated to the board.

Q. 60. Is it an unusual thing for banks to borrow moneys for such purposes?

A. No, sir; I made such a loan within the last two days to a Philadelphia bank.

Q. 63. I notice, Mr. Jordan, that these notes of Gahr are not indorsed by the Fidelity National Bank or by any officer thereof as such. Will you explain how that happened?

A. So far as I was concerned, it is an omission; but still we do discount notes without endorsers—that is, without an endorsement. We have a form of guarantee, but we considered the letter of the bank a sufficient cover."

It surely will not be denied that a principal is liable for money so obtained by the deceit of his agent. If the person advancing the money is made to believe that the agent is asking it for the principal, when in fact he is not, and the money is advanced on that belief, the legal effect is the same as though the agent really meant to borrow it for his principal. Harper certainly either asked the loan on behalf of his bank or intended to make appellant believe he was so asking it. Appellant did so believe, and in that belief advanced the money.

A question was made below as to the right of a national bank to make a loan; but such right is declared by the chief justice in *First National Bank* v. *Exchange Bank*, 92 U. S.

at p. 127). After quoting from the statute reciting the powers conferred on national banks, he says:

"Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor."

If the bank had the power, there is no question as to Harper's authority to exercise it. He had the fullest authority to do everything in the conduct of its business.

II.

THE MONEY WAS DRAWN BY THE FIDELITY BANK, WHATEVER BECAME OF IT.

If our position, that the loan was asked and granted for and on account of the Fidelity Bank, and that the notes given were merely formal and collateral, be correct, that bank became liable to appellant as soon as appellant placed the money to its credit. Whether it was drawn out or not would be a circumstance merely affecting appellant's security by way of the right to apply the deposit to the obligation to repay.

The fact that the amount so credited was, in fact, nearly all drawn out on drafts signed and presented by the officers of the Fidelity Bank seems to us important, therefore, merely as one of the circumstances to be considered as showing the nature of the transaction.

True, the Fidelity Bank would have had the right to draw the money if it had been borrowed by another and the proceeds merely placed at its disposal, as well as in case the money was borrowed for it and on its account, so that the mere drawing of the money might be claimed to be a circumstance of ambiguity as to the question whether the bank was the real borrower. But if the case were one of deception, as above suggested, then the drawing of the money by the bank is important, as showing the result of the deception upon appellant and the taking of the fruit thereof by the Fidelity Bank.

But for whatever purpose it may be relevant to show the drawing of the money by the officers of the bank on drafts made in its name, that purpose can not be defeated by merely showing that the books of the Fidelity Bank do not show that the money so drawn was, in fact, placed in its coffers or used in its business. Whether this condition of the books was due to carelessness in keeping them, or to the fact that its officers embezzled the money after it was so drawn, can not affect appellant. Harper, as Vice-President and Manager, drew one of the drafts, and Hopkins, the Assistant Cashier, drew the others. Their authority to draw drafts in the name of the Fidelity Bank is not questioned. The drafts used were the regular printed drafts of that bank. They were drawn and presented apparently in the regular course of business. The Fidelity Bank is estopped to say that the amounts for which they were drawn were not duly paid to it. It had and received the money, so far at least as appellant is concerned, when appellant honored those drafts; so that its liability, if and in so far as that liability depended on its having and receiving the amount placed to its credit by appellant, was complete when the drafts were paid. Whether the money was lost or misappropriated, does not concern appellant. In the eye of the law, the money came into the possession of the Fidelity Bank at the same moment it left that of appellant.

III.

ERROR IN SUSTAINING A DEMURRER TO CERTAIN PARTS OF THE BILL.

In addition to setting up the fact that appellant made the above loan to the Fidelity Bank, the bill also averred (Rec., pp. 2 and 3) that the certificates of stock, pledged with the collateral notes given to evidence the loan, were signed and issued by the regular and only authorized officers of the Fidelity Bank, under the following circumstances:

The directors of the bank had voted to increase its capital stock from $1,000,000 to $2,000,000, certificates for all the original stock having been issued. Each holder of original shares was to have the privilege of taking an equal amount of the new stock at $135 per share. Long prior to the issuance and pledge of said certificates with appellant, holders of original shares paid to the bank large amounts of money on account of such increased stock, to be held by it until the steps required by law to authorize such increase should be taken, which sums said bank agreed to and did hold in trust and on special deposit until such increase should be authorized and made. Harper made large payments himself on such account, and received by purchase from other stockholders their rights under similar payments made by them, amounting in all to over $150,000. The necessary steps were not all taken to authorize the increase; but Harper procured from the president and cashier certificates, signed by them, for the increased stock to which he would be entitled on account of the payments so made, being the certificates so pledged with appellant. The bill averred that, by reason of the pledge of said certificates and the failure and winding up of said bank without completing the steps required to authorize such increase, appellant was subrogated to Harper's right

to have the sums so paid on account of such intended increase returned to him, and prayed relief accordingly.

Exceptions were filed to this part of the bill, which were overruled with leave to demur (Rec., p. 9). Thereupon a demurrer was filed to that part of the bill, on the ground of defect of parties, viz.: Harper and the persons who had assigned their rights to him, and for multifariousness (*id.*). This demurrer was sustained.

We submit that as the bill averred and the demurrer admitted an absolute assignment to Harper by the other stockholders named, leaving no further interest in them, and no relief was or could be sought against them; and as the pledge by Harper of the certificates which embodied his rights was averred and admitted by the demurrer, neither Harper nor his assignors were necessary parties.

We submit further, that as the pledge of the certificates was a part of the very transaction set up in the bill, the assertion of this right, in connection with the claim which the bill sought to compel appellee to allow, did not make the bill multifarious.

We ask a reversal of the decree dismissing the bill.

Respectfully submitted,

JUDSON HARMON,
EDWARD COLSTON,
GEO. HOADLY, JR.,
Counsel for Appellant.

Office Supreme Court U. S.
FILED.
JAN 27 1894
JAMES H. McKENNEY,
CLERK.

251

Supreme Court of the United States.

OCTOBER TERM, 1893.

The Western National Bank of New York,
Appellant.

vs.

David Armstrong, Receiver of the Fidelity National Bank of Cincinnati, Ohio,
Appellee.

BRIEF FOR APPELLEE.

JOHN W. HERRON,
Counsel.

Supreme Court of the United States.

October Term 1893.

No. 251.

THE WESTERN NATIONAL BANK OF NEW YORK, Appellant.

vs.

DAVID ARMSTRONG, Receiver of the Fidelity National Bank of Cincinnati, Appellee.

BRIEF FOR APPELLEE.

This case comes into this Court on appeal from the decree of the Circuit Court of the United States for the Southern District of Ohio, dismissing the Bill of Complainant. The bill was filed to compel the defendant, as receiver of the Fidelity National Bank of Cincinnati, to allow a claim in favor of the appellant against that bank, of $195,415.37. It is alleged in the bill that on the 28th day of May, 1887, the Western National Bank of New York loaned to the Fidelity National Bank of Cincinnati the sum of $200,000.00, and took as collateral to said loan four notes of A. P. Gahr to the order of and endorsed by E. L. Harper, for $50,000.00, each, and 1,600 shares of the capital stock of the Bank of the par value of $100.00 per share.

The defendant by his answer denied that the Western National made such a loan to the Fidelity, but averred that it discounted the four notes of Gahr endorsed by Harper and secured by the collaterals of sixteen hundred shares of the Fidelity Bank Stock and that the Fidelity National was in no way liable for the money.

The facts mainly appear in the correspondence between the parties, set forth in the record, and in copies of the entries made

in the books of the appellant bank. Some testimony was taken by deposition. There is very little conflict of testimony in the case.

The correspondence between the parties, so far as this record shows was commenced by a letter from Harper, as vice-president of the Fidelity, offering the services of his bank as the correspondents in Cincinnati of the complainant bank, and stating the terms on which it would do such business. This letter was dated April 28th, 1887. On April 30th, 1887, E. L. Harper wrote to complainant enclosing $28,500.00 to pay for three hundred shares of the stock of the Western National Bank which had been subscribed for by E. L. Harper, Briggs Swift, and B. Weiss, one hundred shares by each person. It would seem from the letter that a partial payment on this stock had been previously made, and that some correspondence on that subject had taken place. This stock matter is, also, the subject of a letter from Harper on May 10th, in which he gave directions as to the issuing of certificates for the stock so paid for. Both of these letters are written on the letter-head of the Fidelity, and also contain matters pertaining to the business of the bank. In letters dated May 6th and 13th, the cashier of the complainant bank writes on the subject of the business relations proposed by Harper.

On May 16th, the first mention of the loans in question is made in a letter written on the letter-head of the bank, but signed "E. L. Harper," without the addition of his official character. The letter is as follows: (p. 48)

"At what rate will you take a loan of $200,000.00 secured by sixteen hundred shares of our bank stock, due $50,000.00 each, three, four, five, and six months, and place proceeds to the credit of this bank, and the bank to designate you as one of their reserve agents and keep part of their New York account with you under your proposition of the 6th inst.? I will endorse the collateral notes and I am worth over $2,000,000.00 net. We have just doubled our capital stock, all paid in, and paid in $400,000 00 surplus, and this loan will give some of our principal stockholders time to turn. 155 is to-day bid, and 160 asked for our stock.

Our balance will no doubt average more than $200,000.00. I can also, if you desire, give you my firm account, Messrs. E. L. Harper & Co., and send you some choice business paper from time to time. While Mr. Swift and myself are only small stockholders with you, we desire to give you all the business we can."

On May 18th the cashier of appellant in a letter marked "Personal" acknowledges the receipt of the letter of the 16th, and states that Mr. Jordan is absent and that the letter will be held until his return. On May 20th, Mr. Jordan writes that Mr. Harper's proposition will be laid before the Board on the following Tuesday.

On May 24th, Mr. Jordan writes to Mr. Harper as follows:

"Dear Sir: Your letter of May 16th has been submitted to our Board. We will be pleased to make the loan of $200,000.00 upon the sixteen hundred shares of your bank stock, payable on demand at any time after four months, five and six months being too long a time.

"You will please draw the notes to your order, and forward them at your convenience to this bank.

"We shall be pleased to receive the account of Messrs. E. L. Harper & Co., and will discount short time business paper whenever we are in a position to do so."

Mr. Harper on May 26th, answers as follows (p. 50):

"Dear Sir: Your valued favor of the 24th is received. In accordance therewith, I hand you for discount A. P. Gahr's four notes of even date of $50,000.00 each, payable on demand at any time after four months from date. Each note secured by four hundred shares of the Fidelity National Bank stock, and endorsed by me personally. Please place the amount to the credit of the Fidelity National Bank, Cincinnati, Ohio. We enclose herewith signatures, and have asked your bank to be approved as one of our reserve agents. I will open E. L. Harper & Co. account soon, and trust that the arrangement will be mutually profitable and satisfactory, and our relations will continue for a long time. Respectfully yours, E. L. Harper."

"In accordance with Mr. Jordan's letter of the 24th inst. please

place the full 200,000 to credit. Advise me the amount of interest and I will send check."

To which the Western National replied in its letter of May 28th (p. 51) as follows:

"Dear Sir: Your favor of the 26th is at hand with enclosures, four notes of A. P. Gahr, of $50,000.00 each, and certificates for sixteen hundred shares Fidelity National Bank Stock.

As requested we have credited the account with your bank with $200,000.00. There is due us from interest from May 28th to Sept 29th (124 days at 6 per cent.) $4,133.33, for which please remit us your check."

The sum of $200,000.00 was placed to the credit of the Fidelity National on the books of the Western National Bank, and the amount of discount, $4,133.33, remitted by Harper.

When the account was received by the Fidelity Bank containing the entry of this credit, Mr. Harper stated that that was his individual matter, and proceeded to check out, in the name of the Fidelity, the amount so deposited, which never appeared on the books of the Fidelity at all, the entire proceeds being received by him.

It is claimed, on the part of the appellant, that this correspondence is evidence of an agreement on the part of the Fidelity to borrow $200,000.00 from the Western National Bank. Is this so?

Mr. Harper does not make the application as vice-president of the bank; the letter making the application, and every subsequent one upon the subject of the loan, is signed by him individually. Nor does he mention the bank as a proposed borrower. The statement is: "At what rate will you take a loan of $200,000.00 secured by sixteen hundred shares of our bank stock? I will endorse the paper, and I am worth over $2,000,000.00, and the stock offered as collateral is worth 155 to 160." He does not speak of the bank's condition, but of the value of the stock offered as security.

It must be remembered that up to this time there had been no business transactions between the two banks, but that there

had been such between the appellant and E. L. Harper. He had been one of the original subscribers to the stock of the appellant; was then a stockholder; had remitted to it the money to pay for his stock, and had directed how it should be issued. Those letters, which are confessedly on his private business, were written on the letter-heads of the bank, and contained matters pertaining to the business of the bank.

The fact, then, that the letter of May 16th also contained such matters, could not have led to the supposition that it was all of that character. In the case referred to by counsel (*Xenia Bank* vs. *Stewart*, 114 U. S., 224), the official character of the officer was attached to his writing, because the subject of the writing was the business of the bank; but to do so in the present case is begging the whole question. It must first be shown that the business of asking a loan was the business of the bank, which is wholly denied here, before it will be inferred that a letter signed by him individually on that subject was an official letter. From the fact that the letter is signed by Harper individually, it would naturally be inferred that the subject-matter of the letter was his individual business. When it is shown that it was the business of the bank, the form of the signature, according to the case cited, is immaterial. Nor is there anything in the letter to indicate that the loan was to be for the bank, but the contrary. The application was for a loan on stock collateral. That collateral could not have been the property of the bank, for the letter states that all the stock of the bank had been paid for in full. The bank was prohibited, by section 5200 of the Revised Statutes, from loaning money on its own stock, or from becoming the owner of its own stock, except in certain contingencies. The inference must therefore have been that the stock did not belong to the bank. The notes were to be indorsed by E. L. Harper, worth $2,000,000.00. The inference which any one ought to draw from these facts would be that the loan was for the person whose property was offered as security, and not for one who could have no interest in that property. It was so understood at the time by the appellant. The immediate answer to it, signed by the cashier of the appellant, is marked

"Personal," showing that he understood it was a personal matter of E. L. Harper. It is true this letter is not the one accepting the offer, but it is now referred to as showing the understanding of the bank officers, by a record made at the time, and confirmed by the entries on the bank's books (which will be referred to hereafter), as against the subsequent recollection of certain directors as to what was in their minds at the time.

If it was understood to be a loan to the bank, why offer its stock as collateral? The indebtedness of the bank would be a higher security than its stock. If the bank was insolvent the stock was worthless.

Again, the letter of May 16th says: "The making of this loan would give some of our principal stockholders time to turn." Does not this indicate that the loan was for the benefit of the principal stockholders, and not for that of the bank? The petition, in fact, alleges that the stock sent on as collateral was the property of several persons who had assigned it to Harper, and new certificates had been issued to him.

Nor does the offer to make the appellant one of the reserve agents in New York change the character of the transaction. Mr. Harper was the manager of the Fidelity National Bank. He was in a position to apply for the appointment of its reserve agents in New York. If the appellant granted him a favor by making him a loan, he was willing to grant one to it, and it seems that he did so.

Nor do the answers of the appellant indicate the intention to make a loan to the Fidelity Bank. They do not refer to the bank at all. The first says: "We will be pleased to make the loan on sixteen hundred shares of your bank stock." "You will draw the notes to your order." "We shall be pleased to receive the account of Messrs. E. L. Harper & Co., and will discount short-time business paper whenever we are in a position to do so." It does not specify whose notes were to be indorsed by Harper. That was immaterial, as the loan was on the credit of Harper and of the sixteen hundred shares of bank stock. Is it possible that, if the loan of so large an amount was supposed to be to the bank,

there would not have been one word in the letter indicating that fact? And if the notes were to have been the notes of the bank, would it not have occasioned some remark when they received the notes of Gahr instead of the notes of the bank? As said by Justice Bayley, in *Enley et al.* vs. *Lye et al.*, 15 East., 7: "Burrough never considered himself as lending money to them. If he had, he would have made some entry on his books, charging them as his debtors." And again, after the notes were received and the loan made, the cashier of appellant writes on May 28th: "As requested, we have credited the account of your bank with $200,000.00. There is due us for interest * * $4,133.33, for which please remit us your check." This letter indicates that the cashier considered the loan as a personal one of E. L. Harper, and he has never testified that such was not his belief.

But not only does the testimony fail to show that the loan was made to the Fidelity National Bank, but the contrary. It is true that Messrs. Jordan, Canda, and Gogorga, directors of appellant, do testify that they thought the loan was made to the Fidelity; but their testimony is clearly incompetent. They admit that all they had before them was Harper's letter of May 16th. No officer of the Fidelity Bank was present when the loan was made. And the testimony of these directors, such as it is, was given three years after the occurrence took place, and after it became necessary for the Western National Bank to establish such a loan, or to lose its money. Incompetent testimony may be excepted to at any time. It will not be considered by the Court, whether excepted to at all, or not.

The entries on the books of appellant, however made at the time, flatly contradict these statements of the directors of the bank. Aside from the testimony which will be considered hereafter, that the transaction was not, in the banking sense, a loan at all, but a discount of the paper, the entries on the books of appellant show that it was not made on the responsibility of the Fidelity National Bank.

The first entry of the transaction on the books of appellant was

made in the discount book. A copy of the entry on that book appears on page 58 of the printed record. Several entries of discount made on the same day appear in this copy, to show the proper effect of the entries, and the mode of doing business by the bank. The Fidelity National Bank appears only in the first column in that book, headed "Offices," which means, as I understand, the party to whom the proceeds of the paper is to be credited. The first discounts shown in that copy are from the offices of W. Von Sachs & Son. These parties were mere brokers, and Mr. Jordan in his deposition says that their names did not appear on the paper discounted, and that they were not liable to the bank for the discounts but the proceeds were paid to them. The next case is that of "Eaton, Cole & Burnham Company," and these parties were the makers of the paper, and, therefore, liable. The third contains the name of the Fidelity National Bank, and in the same position as that of W. Von Sachs & Son—neither parties to the paper, nor liable to the bank. The name would seem to be placed there as showing the name of the party to whom the proceeds of the discount were to be credited. But the Time Loan Book is conclusive on the question now under consideration. The copy of the entry on that book appears on page 59, where under the printed heading, "For Whom Made," the entry says, "E. L. Harper, Cincinnati, Ohio." This entry most clearly shows that the loans were made for E. L. Harper. And, again, on the Discount Tickler book, which is a book in which the discounts are entered, and which appears on page 62, the transaction is entered "E. L. Harper, September 29th, $50,000.00." And, again, in the General Debit Book, p. 62, "Time Loans, No. 7, 8, 9, & 10, E. L. Harper, September 29th." To meet the effect of these entries, Mr. Jordan testified that the Time Loan Book was not opened until June 20th, and there is an intimation that the entry on the book of the name of E. L. Harper was an error of the clerk, Mr. Ruhl, who attended to it. But Mr. Smith, who was assistant cashier of the appellant, and whose deposition was taken by it, and appears on page 42, says that this entry was a copy from some other book; not a literal copy, but "practically the

same Simply another form of ruling and lining." That other book, from which the Time Loan Book was copied, must either have shown the same words, or it must have been in such language that the book-keeper of the bank understood from the entry that the loan was to E. L. Harper. It shows that the general understanding in the bank, and the effect of the entries upon the books of the bank, were to that effect. Mr. Smith also testifies on page 44 that this Time Loan Book was regularly laid before the directors at their meetings after it was opened. It was, therefore seen by the directors at their meetings, and remained unchanged. It was not a small matter which might have been overlooked. It was the entry of four loans of $50,000.00 each, which must have been seen every time the eye of a director fell upon that book. If the loan had not been made to E. L. Harper as these entries stated, but to the Fidelity National Bank, is it possible that the entire body of directors could have failed to have noticed the mistake and to have had the matter corrected?

But there is no claim that the Discount Tickler Book was a new book, or only opened at the date when the Time Loan Book was. And the same statement as to the party to whom the loan was made appears in that book. Indeed there is not a single entry made in a single book or paper of the Western National Bank indicating that this loan had been made to the Fidelity National Bank, or that that bank was in any way the debtor of the Western National. It seems impossible to believe that a loan of this amount could have been made by the bank and have nothing on its books to indicate the true party primarily liable for it or some obligation of such party. It did have the obligation of E. L. Harper and his name on its books. It did have his stock as collateral but it not have the name or obligation of the Fidelity National in any form whatever.

Again, on May 31st, Mr. Harper remitted the interest for these amounts (p. 53), in his individual name. Mr. Jordan testifies that Harper sent his individual check, but he is probably mistaken in this, as the letter in which it was sent speaks of it as a draft. But this letter, like all others on the subject, is the indi-

vidual letter of Harper and not as vice-president of the Fidelity Bank.

There is no reason why the Western National Bank should not have loaned Harper $200,000.00 on the security offered. He was a stockholder in the Western National. He was reputed to be wealthy. He stated in the letter asking for the loan that he was worth $2,000,000.00. The stock which he offered as collateral was at that time quoted on the stock exchange as worth $248,000 00. It was good security to the loan asked.

Again, the security offered belonged to Harper, and he was indorser on the paper. Did not these facts indicate a loan to him? With a bank of a capital of $2,000,000 00, and its stock selling at 165, why should he indorse for it, and pledge his own property, of greater value than the loan, as security for it?

In the letter asking the loan, Mr. Harper speaks of indorsing the collateral notes. This does not mean notes collateral in the legal sense, but in the ordinary use of the term—notes secured by collaterals.

Nor does the fact that the proceeds were directed by Harper to be placed to the credit of the Fidelity indicate that it was a loan to the latter. Hearne and Yergason, bankers of long experience, testify that it is very customary for persons to deposit in a bank money to the credit of others. There was nothing unusual in the transaction as directed by Harper in the present case. It was the natural and easiest possible manner of receiving the proceeds of his loan. He had no account as yet with the appellant, and the Fidelity had. And it was exactly what a party having money in New York would naturally do—have the money deposited there to the credit of the bank with which he did business in the place where he resided.

The appellant's counsel claim that the defendant is liable for the loan on account of the deceit which he claims was practiced by Harper. He claims that Harper agreed to let this money remain in the appellant bank as part of the Fidelity reserve fund, and did not do so. This claim rests solely in the vivid imagination of Mr. Jordan, whose only ground for the claim rests on the letter of

May 16th, and is as baseless as his claim that this letter indicated a loan to the Fidelity Bank. The letter does promise to make the Western National a reserve agent for the Fidelity, and that was done. It does say that its reserve will no doubt average more than $200,000.00; but at the time the application for a loan was made, the appointment of the Western as a reserve agent had not been made or even applied for. And it is the veriest nonsense to assert, as Mr. Jordan does, that he believed that Mr. Harper was willing to pay 6 per cent. for $200,000.00, and give his own property, worth $248,000.00, and his individual indorsement as security, and that the money was to lie in the bank in New York, from which it was borrowed, the entire time. The other officers of the bank, who knew as much of the transaction as Mr. Jordan, and were as experienced bankers, did not hesitate to pay the drafts on that fund when presented. It was not necessary to establish a new reserve agency, or to furnish such collateral, to obtain such accommodation.

The letter states why the loan was wanted, and did not state that it was for the purpose of permitting it to remain in the appellant bank in the City of New York. This, however, is not an action for deceit.

II.

The second defense in this case arises from the character of the transaction. The defendant claims that the transaction was a discount of negotiable paper, and not a loan of money; and as the Fidelity National did not indorse that paper, it is not liable, even if it was the party conducting the negotiation and receiving the proceeds.

Harper's letter of May 16th, and complainant's answer of May 24th, were merely preliminary to the transaction itself. Harper inquired if a loan could be procured, and on what terms. The complainant answered that such a loan could be had, and stated for how long a time and the security required. But neither letter stated the details further. These were stated in Harper's letter of May 26th, and accepted by the cashier of the complainant

in his letter of May 28th. Harper said: "I hand you for discount A. P. Gahr's four notes of even date, of $50,000.00 each, payable on demand at any time after four months from date, each note secured by four hundred shares of the Fidelty National Bank stock, and indorsed by me personally. Please place the amount to the credit of the Fidelity National Bank, Cincinnati, Ohio." "In accordance with Mr. Jordan's letter of the 24th, please place the full 200 M. to credit. Advise me of the amount of interest, and I will send check." The cashier replied: "Your favor of the 26th instant is at hand, with enclosures, four notes of A. P. Gahr for $50,000.00 each, and certificates for sixteen hundred shares Fidelity National Bank stock. As requested, we have credited the account of your bank with $200,000.00. There is due us for interest, from May 28th to September 29th (124 days at 6 per cent.), $4,133.33, for which please remit us your check."

It must be remembered that this correspondence was not between a shrewd bank official and a novice in bank usages and terms. On the contrary it was between able and experienced financiers and bank officers. They knew what discount meant, and how loans were made. When, therefore, the four notes of Gahr were sent to the complainant bank for discount, the officers of the latter fully understood what was desired and acted accordingly. The paper was discounted. Of this there cannot be a particle of doubt. It was immediately entered upon the discount book and passed through the bills book as discounted and entered on the Discount Tickler and the General Ledger, as bills discounted. The interest in advance was calculated and remitted for the time the paper had to run, as is the case with discounts, and is not the case with loans. On the back of each of the notes was endorsed "B. D." (Bills discounted) from 199 to 202 which was the regular number of the paper as discounts of the bank. Mr. Jordan, on page 28, testifies as follows:

Q. 114. According to the custom of your bank, when notes are discounted what marks are made upon the paper to show the fact?

A. A number is put upon it, that is all. I don't know whether we marked them "B. D." or not. There are no marks at all except the number in its order.

Q. 115. Look at the four notes of A. P. Gahr, about which you have testified, and see whether they are marked in that way?

A. They are marked "B. D." (Bills discounted.)

Q. 116. I think they all have "B. D." that way, if we can get at it. What is the number on these notes?

A. 201, 202, 199, and 200, that is what they are. "B. D.", from 199 to 202.

Q. 117. Those marks and letters about which you have testified in your last answer, were the marks and letters used by the bank at the time to indicate that these were bills discounted?

A. Yes, sir.

And Henry A. Smith, the assistant cashier of the complainant testifies on page 44.

Q. 26. Look at the notes of A. P. Gahr, and state what the figures and letters on their backs, "B. D. 199, 200, 201, and 202." indicate?

A. They indicate that they were entered as bills discounted in the Bills Discounted Book.

Q. 27. These are the marks which your bank was in the habit of placing on the back of bills discounted, was it not?

A. Yes, sir.

Q. 28. Were you in the habit of placing those marks and such marks upon any notes except such as were discounted?

A. No, not these marks.

With this testimony, and the record made at the time, there cannot remain a shadow of a doubt as to what the transaction was; that it was the discount of the four notes of A. P. Gahr, of $50,000.00 each, endorsed by E. L. Harper and secured by 1,600 sharesof Fidelity National Bank stock, and the proceeds by direction of Harper credited to the Fidelity National Bank.

Upon such a transaction, what is the legal liability of the Fidelity National Bank on the supposition that it received the pro-

ceeds of the discount, and was the party procuring the discount? Justice Baldwin, in *Winshtp* vs. *The U. S. Bank*, 5 Peters, and on page 567, stated clearly the legal result of such a transaction.

"The purchase or discount of a note is a contract wholly unconnected with the object, usage, or application of the money paid. A party who sells a bill or note incurs no liability to the discounter by the mere contract of discount where he does not endorse it, nor does the discounter who pays for the discounted note or bill in other notes and bills without endorsement, guarantee their payment.

The case of *Emley and others* vs. *Lye and another*, 15 East. 7, is a leading case on this subject, and has been followed and referred to ever since its decision, both in England and in this country, and in decisions and text books. The facts were almost identical with those in the present case.

Horne (the agent) carried certain bills to Burrough (the banker), some of them drawn in the name of one member of the partnership, and others in the partnership name. Burrough was not acquainted with the defendants, but had received strong recommendations of them and they were discounted by him at various times; he making no distinction between the bills, but conceiving that they were all drawn on the partnership account. The proceeds of the bills were remitted and paid by Horne to the partnership account, and the discounts thereof allowed to him in his account with the partnership.

The syllabus is as follows;

"Where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership name, with the same banker, the latter has no remedy against the partnership either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills, though the proceeds were carried to partnership account; the money being advanced solely on the security of the parties whose names were on the bills by way of discount, and not by way of loans to the partnership;

though the banker conceived at the time that all the bills were drawn on the partnership account."

Lord Ellenborough says, on page 11:

"The bills considering the transaction as a discount between the parties, are his (the drawer's) only. But it is contended that as the proceeds went to the use of the partnership, the partners are, therefore, liable on the other counts. I am at a loss to discover what difference that circumstance can make, if it were originally a a mere matter of discount; and I cannot find any evidence to show that it was anything else. It was supposed, indeed, by Burroughs that the money would be applied to the partnership use, and to such use it was, in fact, applied."

Justice LeBlanc says:

"It appears to me, on the evidence, notwithstanding the apprehension of the banker or the clerk or the subsequent application of the money, to be merely a transaction of discount, and not an advance of money taking the bills as collateral security."

In the case of *Coster* vs. *Clarke*, 3 Edwards Chancery Rep. 411, the Court says:

"Where a bank had given credit individually by discounting an individual note, it was not allowed to prove the debt in a co-partnership suit (although the drawer and endorser were two of the partners) even on strong allegations that the note was made for and was applied to partnership purposes. Nor could the drawer have this benefit especially as he had submitted to a decree of the court in the cause, whereby the endorser was recognized as having assumed the notes individually."

And, in *Bevins* vs. *Lewis*, 1 Simons, 376 the court says:

"If a partner borrows a sum of money and gives his own security only for it, it does not become a partnership debt by being applied to partnership purposes with the knowledge of the other partners."

Parsons on Partnership, 4th Ed. states the rule as follows:

Page 89, section 88, Note F. "As when the transaction between a banker and one partner is, in fact, a discount by the former of the latter's paper notwithstanding the application of the

funds so raised to the uses of the firm, and the understanding of the banker that they would be so applied, the discounter does not become the creditor of the firm, but simply of the contracting partner."

And on page 181, sec. 138:

"If paper be drawn, or discounted, or received, bearing only the signature of one partner, and the proceeds are directly carried to partnership fund, the partnership cannot be charged, because it is considered that the credit is given on negotiable paper only to those whose names it bears."

In *Peterson* vs. *Roach*, 32 O. S. 374, the syllabus is as follows:

"Where a partner borrows money on the credit of his individual note which is signed also by a surety, such borrowing does not create a partnership debt though the money be applied to partnership purposes, and the principal of such surety is the individual partner with whom he joins in the execution of the note, and not the partners generally."

And the Court, on page 378, says:

"The questions raised by the demurrer to this petition are, then, as we think, substantially these: Where a partner on the security of a note signed by him individually and by another as his surety, borrows money for the use of the partnership, and which is, in fact, applied to partnership purposes, does the money so borrowed become a partnership debt? And if payment of the note be enforced against such surety, does he thereby acquire a right of action against all the partners as his principals? Both upon principal and authority we think these questions must be answered in the negative."

The Court cites and reviews a large number of authorities bearing upon this question.

In the case of *Ford* vs. *Williams*, 21 How., 289, Justice Grier says:

"If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed after-

wards to charge the principal, but when he deals with the agent without any disclosure of the fact of the agency, he may elect to treat the after discovered principal as the person with whom he contracted."

The only case referred to by appellant's counsel in his brief, as sustaining his claim in this case, is that of *Marston* vs. *Boynton*, 6 Met., 127. In that case the Court found that the loan in question was made to the defendants and on their credit, and that the note given at the time of making the loan was only collateral to this loan. There was no discount of the note, or any evidence that it was accepted in settlement, but merely received as evidence of the loan made. The same Court, in a later case, has decided the question now before this Court, as claimed by me. I refer to the case of *The Bank of British North America* vs. *Robert Cooper et al.*, as reported in 5 Gray, 567. The syllabus is as follows:

"A bank which has discounted bills drawn in his own name by the agent of a disclosed principal, can not sue the latter, nor prove against his estate in insolvency, although the proceeds are applied by the agent to his use."

On page 570 the Court says:

"While the recent English cases are found to be very strong in favor of the right to charge an unknown principal upon contracts made by his agent, upon oral proof of who is the real party, yet there will be found to be a leading distinction taken between cases of commercial paper in the form of bills of exchange and negotiable promissory notes, and other simple contracts, holding that no one but a party to such negotiable paper can be sued for the non-payment thereof."

And on page 573: "Nor do the facts present a case sustaining a legal claim against the estate of Horace Gray individually, on account of an original indebtedness independent of that upon the bill itself. It is a case of a mere discount of a bill, and that of a bill drawn upon a third party, and accepted by that party in favor of a fourth, by whom it was indorsed. There was no previous loan to Horace Gray, and no gronnds for setting up a previous indebtedness; nor can the appellants maintain their claim

upon the ground of an undisclosed principal. The character of the transaction being a discount of the paper upon the name borne upon it, and such being the original transaction, the appellant can not go behind the paper and show that others received the benefit of the money paid for this bill."

See, also, Byles on Bills, 5th edition, 26.

Bass vs. *O'Brien and others* 12 Gray, 477.

Slosson vs. *Loring*, 5th Allen, 343.

Pentz vs. *Stanton*, 10 Wend., 276.

Stackpole vs. *Arnold*, 11 Mass., 27.

III.

It is claimed by the appellant's counsel that the Court erred in overruling the demurrer of the defendant to one claim set up in the petition.

It was alleged that the sixteen hundred shares of stock sent by Harper as collateral security for the Gahr notes, was not legally issued; that the comptroller of the currency had never authorized the increase of the capital stock of the Fidelity National Bank to $2,000,000.00, but that, nevertheless, the officers of the bank had proceeded as if such increase had been authorized, and had received from the subscribers to such new stock one hundred and thirty-five dollars per share, and issued certificates of stock to them, and that the stock forwarded by Harper to the appellant was part of the increase of stock so issued. Under the decision of the U. S. Circuit Court for the Southern District of Ohio, Justice Jackson, delivering the opinion, as reported in *Winters* vs. *Armstrong*, 37 Fed. Rep. 508, such stock was illegally issued, and the parties paying for the same became the creditors of the bank for the amount so paid. It is alleged that Harper or the parties from whom the stock was transferred to him, paid this $135.00 per share to the Fidelity Bank on the stock so sent on as collateral, and thus they became creditors of the bank, and if it was still due to them at the time of the failure of the bank they should be entitled to dividends on such sum. It is now claimed that the appellant bank is entitled to be subrogated to the claims

of these several parties against the bank. This claim was set up in the petition as filed, but a demurrer to the same was sustained by the Court. The appellant's counsel claim that this decision was erroneous.

To this I answer:

1st. There is no right of subrogation in equity in such a case as claimed here. The sum paid for the stock by Harper and others when the stock was issued by the bank, became the property of the bank, deposited as an ordinary deposit, and mingled with the other funds of the bank, and was not thereafter in any way connected with the stock. It would not pass from seller to purchaser of the stock, and Harper and the other parties, on the theory that the stock was invalid, could collect it back or check it out, or transfer it as they saw fit. I know of no principle of equity that would make the purchaser of such stock the owner of a portion of the bank's credit in favor of the party from whom he purchased it, or that the sum paid to the bank was such an incident to the stock as to pass with it.

2nd. Harper and the other parties paying this money to the bank are not parties to this suit. The credits arising from such payments confessedly belonged to the parties making them, and the proposition now urged is to divert such credits from them, and give them to the apellant. Upon this question they have a right to be heard. They may deny the complainant's claim wholly. They may claim that the credit did not pass with the sale of stock. For a final determination of these questions they are necessary parties. The judgment of this Court on these questions would not discharge their claim against the Fidelity National Bank. They could still sue to recover it back, and the judgment of this Court in a case where they are not parties would be no bar to their claim The receiver has a right to be protected in any judgment made by this Court, and should not be compelled to allow a claim when another may hereafter be found to be entitled to it.

3rd. The bill as filed is multifarious. It joins in one bill two wholly distinct causes of action: one a purely legal one; and the

other resting wholly in equity. Had the Fidelity Bank not failed, it would not be claimed that these two rights could be joined in one suit in the United States Court. The suit upon the alleged indebtedness if brought against the Fidelity Bank would be an action at law, and when presented to and rejected by the receiver the proceeding would be simply a statutory one to establish the claim as a legal one against the bank. The right of subrogation claimed appeals solely to the equity side of the Court, and could only be enforced by such a bill. Two such causes of action cannot be joined in this Court, and the Court below did not err in striking out this part of the bill on demurrer.

For these several reasons, I ask that the decree of the Circuit Court be affirmed.

JOHN W. HERRON,
Counsel for Appellee.

FILED.
JAN 31 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 251.

The Western National Bank of New York,
Appellant,

vs.

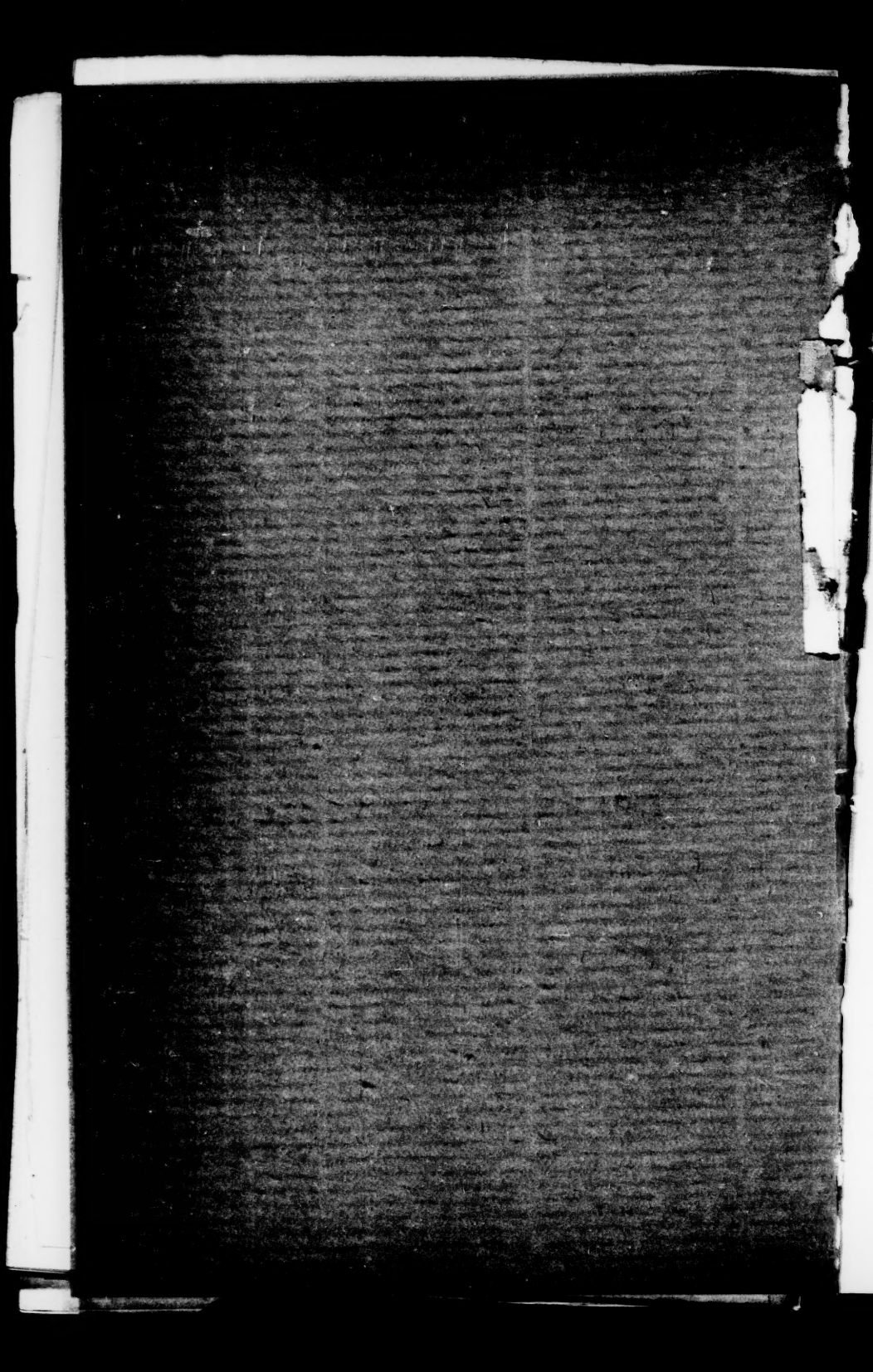
David Armstrong, Receiver of the Fidelity National Bank,
Appellee.

BRIEF FOR APPELLANT IN REPLY.

JUDSON HARMON,
EDWARD COLSTON,
GEORGE HOADLY, JR.,
Counsel for Appellant.

January, 1894.

PRESS OF THE OHIO VALLEY CO., 143 RACE STREET.



Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM NO. 251.

The Western National Bank of New York,
Appellant.

vs.

David Armstrong, Receiver of the Fidelity National Bank,
Appellee.

BRIEF FOR APPELLANT IN REPLY.

The counsel for appellee, commenting on the letter of May 16, 1887, says, speaking of Harper:

"He does not speak of the bank's condition, but the value of the stock offered as security." (Brief p. 4, near bottom.)

That letter is replete with bank talk. In the first place its opening paragraph says:

"Your letters of the 6th–13th to hand. We are pleased to know you will send us your items for the present; under our propositions of April 28th and May 10th, and we will give your business our best attention," etc.

We stop to observe: this letter of the 6th of May (Rec. p. 47) was one stating that appellant would allow interest at 2 per cent. on daily balances on "*your New York account*," to be credited monthly, and that the appellant would credit on receipt at par "demand" items on Philadelphia, Baltimore, etc. The letter of May 13, 1887, stated that the appellant would send its items to "*you*" for the present—that is to say, to Fidelity Bank, not to Harper. Thus far the letter of May 16th is confessedly on bank topics. In view of this previous correspondence, acknowledged in the very opening sentence of the letter of May 16th, it is strange that counsel for appellee should say in his Brief, as he does at p. 4, last paragraph: "It must be remembered that up to this time there had been no business transactions between the two banks, but there had been such between appellant and E. L. Harper."

On the contrary, there had been nothing else between the two banks than business transactions. The first letter to the appellant bank from Harper was one soliciting business for his bank. It must be borne in mind that E. L. Harper was the Fidelity Bank. Every one in it, whether officer or clerk, was his tool.

Appellee's counsel further says (Brief p. 5), that in remitting money to pay for his stock, *a private affair*, in appellant bank, Harper wrote on the letter-heads of Fidelity Bank. From this he draws the inference that appellant knew Harper was used to writing on bank paper concerning private affairs, and therefore he claims the use of the bank letter-heads on May 16th possesses no significance. But, whatever value this theory might possess, it is not borne out by the facts. The letter transmitting the money for the stock—letter of April 30, 1887 (Rec. p. 46)—does pertain to other matters than Harper's private affairs. It transmitted checks to pay for the stock of

others—Briggs Swift, nominal president of the Fidelity Bank, and of one Weiss; it also contained a request that "you" accept "*our*" proposition to collect all "your New York items," and concludes by saying, "and you will start the account with the checks enclosed;" by which he meant, as we suppose, that the checks to pay for stock should be sent out for collection to Fidelity itself and not to any other bank.

A part of the letter—the principal part—was on affairs of the Fidelity Bank. If any inference is to be derived from this, it is that Harper mingled, in the same letters, his private matters with affairs of his bank.

Our opponent further says that from the fact that Harper signed the letter of May 16 without the usual addition of the letters V. P., one would naturally infer the subject of the letter was his individual business. We think no such significance can attach to the omission of the official designation. The character of the business is better determined from what is said of it, than from the way in which the writer signs his name; at least, it should be determined from all the circumstances taken together, and not from the omission or addition of some official designation. Suppose Harper had said on the face of the letter the loan was for his own use. The bank would not have been bound because he appended the designation "V. P." to his signature.

Our opponent says the inference any one ought to have drawn from the letter was that the loan was for the person whose property was offered as security. It may, perhaps, be true as a rule, that one does not offer his property as security for another's debt. But it is not unnatural that one, situated as Harper was, should put up security to enable his bank to borrow money in a squeeze. Harper knew the "true inwardness" of the bank. He knew its outward appearance was

fair, but that it was rotten within. He knew it was necessary to his salvation to keep the stock up. His fortune, his fame, were united with that bank. There was every motive why he should put up his property to enable the bank to borrow. He assigns the reason why the loan is asked. He says in his letter (May 16, 1887), "This will give some of our principal stockholders time to turn." How would it?

As follows: these stockholders had been called on to take additional stock in the Fidelity Bank, to enable it to double its capital; evidently the process had drained them. If the bank could make this loan and thereby swell its assets, it could accommodate with loans some of its "principal stockholders," who were feeling cramped by the amounts they had paid for stock. It may be Harper was one of those "principal stockholders" who wanted time to turn; but he did not say he was, and no one would have suspected it who had no better means of judging of his condition than what he said about himself.

Appellee's counsel says appellant understood at the time that the loan was to Harper individually (Brief p. 5, at bottom). For this statement he has no warrant other than the letter of Cashier Blankenhorn, of May 18, 1887, which, as he says, is marked personal. Yet it is addressed to *E. L. Harper, President Fidelity National Bank.*

The letter merely stated that the matter would be attended to on Mr. Jordan's return. Whatever was meant by marking the letter "personal" seems to have been only the cashier's opinion as to the character of the business. But the cashier did not make the loan, and whatever his views, they formed no part of the transaction.

Our opponent asks if it was a loan to the bank, why offer its stock for collateral? He says the bank was as good as its

stock. This is true. But there is this difference: The possession of the stock as a pledge might have been of material value to appellant had it desired to realize on the transaction before maturity of the loan, by selling the loan. While the loan was, in fact, to the Fidelity, yet the letter spoke of collateral notes secured by stock. These were mere security. In that shape they were deemed more available, or more in conformity to bank usages than a straight note of the Fidelity Bank would have been. Nor is it possible to say just what importance was attached by appellant to this circumstance of the pledge of stock. We ask, with greater propriety, why did Harper, if he was the principal debtor, as claimed by the other side, present himself merely as an endorser—one secondarily liable? Again, in his letter of May 26th (Rec. p. 57), he calls attention to the fact that the notes are endorsed "by me personally." If it was understood to be his private loan it would go without saying that he endorse them personally. Then why call special attention to it if this was his private loan? We renew the attention of the court, in this connection, to the sworn testimony of all the officers of the appellant bank who made this loan, that they made it as a loan to the Fidelity, and so understood the application. (See Rec. pp. 21, 22, pp. 35–40.)

Counsel on the other side say these witnesses state that they "thought" the loan was to the Fidelity. They say positively it was so. He further says this testimony was given at a time when it had become apparent that unless the loan was to the Fidelity Bank the money would be lost. While this is true, yet it is hardly a safe ground upon which to reject their evidence. He further says this evidence is incompetent, but we think not. If the letter of May 16th was ambiguous, as it is now claimed it was, they had a right to state how

they understood it. Moreover the evidence becomes competent in view of the use the opposite counsel makes of the forms in which the transaction appears in appellant's books. The reference to *Emly* v. *Lyle*, 15 East. p. 7, does not meet this case. That case shows conclusively, that there had been no previous dealing for a loan; but the transaction was a simple purchase of a bill of exchange. It was therefore held that the bill of exchange was a full satisfaction and return for the money received by the seller of the paper, and that the buyer of it got all he bargained for when he received the paper, and had no recourse except what it furnished. It would have been otherwise, had the bill been taken as *security* for a loan. (See Wharton's note, this case, 2d Am. Ed.)

Appellee's counsel says that the book entries contradict all the evidence we rely upon as showing the loan to have been made to the Fidelity Bank. In his discussion of the effect of these entries, our opponent begins with the entry called "Discounts." This date was the 28th of May—Saturday. He fails to mention, however, that four days before that time Mr. Jordan had reported this loan in a letter addressed to "E. L. Harper, Esq., Vice-President Fidelity National Bank." He says: "Your letter of 16th has been submitted to our board. We will be pleased to make *the* loan, etc. *You* will please draw the notes to your order," etc. [Italics ours.]

This was the very day the loan was accepted. This letter proves conclusively that the loan was submitted to the board, and that the proposal for a loan was not accepted without discussion, because its terms were varied by the board. It would seem from this that the directors should know to whom they were lending the money.

Our adversary claims much (Brief p. 8) from the fact that the Gahr notes were afterward entered in a book called "Discounts." But this is all accounted for, as we contend, by the course Harper took at this juncture. When he received Mr. Jordan's letter of the 24th of May, notifying him of the acceptance of the loan and asking him to draw the notes to his order and forward them, Harper got notes drawn by Gahr, a director of the bank, and after acknowledging receipt of the letter of the 24th, says: "In accordance *therewith*, I hand you for *discount* A. P. Gahr's four notes," etc. Now, nothing had been said in Mr. Jordan's letter of the 24th about sending Gahr's notes, but quite the contrary. And Gahr's notes were not in accordance therewith. Nor had anything been said in that letter about *discounting* notes. The loan at this time had been passed upon by the board and its terms fixed; they were not to be varied by Harper's sending notes for discount. In the letter of the 16th of May, whatever notes were to be sent were as *collateral* and not for *purchase* by discount. This letter of the 26th of May, 1887, was evidently passed to the clerks, with the Gahr notes, which were treated by them as discounts and marked "B. D." But, as we have remarked, this could not change the nature of the prior completed transaction. There was no new action of the board after receipt of the Gahr notes, and when the Fidelity adopted the loan, as made with the variation as to time, it adopted it on the terms on which the board had made the loan. The first entry on the books of appellant bank was Exhibit 32. (Rec. p. 64.) Under the head, "For whose credit?" are the words, "Fidelity Nat. Bank, Cincinnati, O." This was the original charge ticket. (Rec. p. 52, margin.)

Our opponent also fails to notice, in discussing Exhibit

21 (Rec. p. 58), that this loan was on the direct credit of the Fidelity National Bank. On this subject, Mr. Canda says:

"Here is the entry as it read in the discount book under date of Saturday, May 28, 1887: 'Direct to the Fidelity National Bank, Cincinnati, O.'" (Rec. p. 60, margin.)

Much stress is laid by the other side upon the entries under head of "Time loans," Exhibit 24 (Rec. p. 59), where, under the heading, "For whom made?" occurs the name "E. L. Harper." Counsel asks, with some exultation, if the directors did not have this entry staring them in the face at every meeting after May 24, and would they have allowed it to remain had not the transaction been thereby correctly expressed? But those entries were not made until June 20, 1887, nearly a month after the transaction of this loan was made.

Mr. Jordan says "The 'time loans' account was opened June 20th, for the first time." (Rec. mar. p. 42). Again he says:

"These transfers to time loans were actually made on June 20th, but the dates of the original transactions were preserved." (Rec. mar. p. 43).

The reason for this re-arrangement of loans is given by Assistant Cashier Smith (Rec. mar. p. 73) to be that an order was given "to transfer to time loans certain discounts that we had carried in bills discounted, and that the entries on these time loan books were made in carrying out these orders. It was a general order in regard to the details of the bank that they should be carried in the time loans instead of bills dis-

counted." He further states that these entries in the time loan books were made by Otto Rhul, a former clerk in the bank. (Rec. Id.)

An effort is made by opposite counsel to connect Mr. Jordan with the arrangement of the headings of this time loan account; but the witness, Mr. Smith, shows that such was not the case. Speaking of instructions given by Mr. Jordan on this subject, this witness says (Rec. mar. p. 75):

"Q. 31. You stated that Mr. Jordan gave instructions to have this time loans book made out. Do you know what those instructions were?

A. Not exactly; except in a general way."

Q. 32. What was the sense of them?

A. Simply carrying loans forward that he had discounted to the time loans account where they properly belonged.

Q. 33. Did those instructions include details as to the nature of the entries made in particular cases?

A. No; oh, no."

This book having come into existence only after June 20th, it is not likely that the directors would look through the loans entered prior to that date.

Counsel further says that Harper remitted the interest for this loan in his individual name (Brief p. 9 at bottom). He further says that Mr. Jordan testified that Harper sent his individual check, but adds: "he is probably mistaken in this."

It is very clear that Mr. Jordan was mistaken in it. Mr. Jordan himself corrects the error. In the first instance he said (Rec. mar. p. 36): in response to the question "how was the discount paid?" "I think E. L. Harper's personal check."

But later on in his examination (Rec. mar. p. 50) he said: "I sent to the Chemical Bank, and ascertained that the check

was a Fidelity National Bank check upon them, received in a letter of May 31, 1887." Turning to that letter of May 31, 1887 (Exhibit No. 16, Rec. top p. 53) Harper writes: "Inclosed herewith I send you draft No. 15,529 on Chemical National Bank of your city for $4,133.33 to pay interest, as requested." This letter Harper signs "E. L. Harper" without the addition "V. P." But in it he sends a check of the Fidelity National Bank to pay the interest. Nothing can be inferred from the fact that Harper, at times, omitted his official designation in this correspondence. Many of the letters in which such omission occurred, confessedly concerned the affairs of his bank. On that subject it may be well to notice the fact that Mr. Jordan testified that it never occurred to him that Harper had made such omission. The question is asked him:

"You observe that some of these letters of Harper's were signed with an addition of 'V. P.' for Vice-President, and that some were not so signed?

A. I did not notice that omission at all. I assumed that they were official. (Q. 129, Rec. top p. 29).

Counsel says further, "there was no reason why the appellant bank should not have loaned Harper." It is hardly necessary to discuss that if the loan was not made to Harper, but it may be observed that all the officers of the bank testify that they knew nothing whatever of Harper, or of his standing, except from his own representations, which would be hardly sufficient. They did know the reputation of the bank, however.

Counsel also refers to the fact that Hearne and Yergason, two Cincinnati bankers, testify it is customary for persons to deposit money in bank to the credit of another, but counsel fails to

mention that Mr. Hearne says when such a transaction occurs, the bank receiving the deposit gives a special certificate in the form shown in the Record page 73. No such certificate was issued by the appellant bank. Moreover, when such a transaction takes place there is always some well-defined reason, where one person borrows money to be placed to the credit of another, such as paying a debt or making a loan to the person to whose credit the money is placed; but no such motive is assigned for Harper's action in this matter.

It was not nonsensical, as claimed by counsel, for Mr. Jordan to believe that Harper was willing to pay six per cent. for $200,000 and secure it by his property and individual endorsement, in order to provide a reserve fund for a tottering bank. Mr. Jordan says it was not unusual for banks to borrow for a reserve. He gives instances. (Rec. p. 47, margin.)

However this may be, Mr. Jordan would never have written the letter of June 9, 1887 (Rec. p. 63, top), at a time when there was no motive for misrepresenting. He explains at top of page 30 of the Record how it happened that the Fidelity drafts on this reserve were paid.

Counsel makes an argument to show that in a purchase of negotiable paper the holder has no remedy except against the parties to the paper. The argument would be pertinent if this transaction were a purchase of the Gahr notes; but, as we have said, it is not so. The dealing was for a loan with collateral as security. Every one knows what that means. Collateral is something beside the primary liability, to support it. The application was for a loan (letter of May 16, 1887); the acceptance was of a loan (letter of May 24, 1887). There was no suggestion as to a discount until *after* the

contract of loan had been closed. We claim all that is urged by the opposite counsel to show that this was a discount is entirely without support in the evidence.

Respectfully submitted,

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CINCINNATI, O., January 26, 1894.